Time-Barred Foreclosures and the Statute of Limitations

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Over the past several years, those who service loans in the State of Washington have seen a dramatic rise in the number of lawsuits in which delinquent borrowers seek to quiet title to their homes on the grounds that lenders are barred from foreclosing based on Washington's six-year statute of limitations.

Historically, these lawsuits allege that the foreclosure is time-barred because Notice of Acceleration letters have been issued more than six years prior to the initiation of the foreclosure process. However, based on recent case law, we foresee a real danger of an increase in the amount of lawsuits brought by borrowers who have had their debts discharged in bankruptcy and either continued to make their monthly payments following their discharge, or engaged in a game of cat-and-mouse with the servicer, as result of which the servicer did not commence foreclosure within the six-year period following the discharge. Indeed, in at least one instance, the borrowers who obtained a bankruptcy discharge order successfully quieted title to their home against Fannie Mae based on Fannie Mae's failure to foreclose with the six-year period. The potential of these lawsuits—and given the result discussed above—creates a significant risk to the mortgage industry, which should be addressed, assessed, and mitigated by lenders and servicers.

Washington RCW 7.28.300 permits title owners—not necessarily borrowers—to commence quiet title actions against secured lenders to eliminate liens secured by the property based on the lender's failure to timely foreclose:

> *The record owner of real estate may maintain an action to quiet title against the lien of ... deed of trust on the real estate where an action to foreclose such ... deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.*

The applicable statute of limitations within which a lender can foreclose for purposes of RCW 7.28.300 is six years from the date of acceleration of the debt.

Recently, in *Edmundson v. Bank of Am., NA*, 194 Wn.App. 920, 931 (2016) (*Edmundson*), *Silvers v. U.S. Bank Nat. Ass'n*, 2015 WL 5024173 (W.D. Wash. Aug. 25, 2015) (*Silvers*), and *Jarvis v. Fed. Nat'l Mortg. Ass'n*, 2017 WL 1438040 (W.D. Wash. Apr. 24, 2017) (*Jarvis*), Washington's State and Federal Courts addressed the impact of a bankruptcy discharge on the lenders' ability to foreclose within the purview of RCW 7.28.300.

In *Edmundson,* the Court of Appeals held that the borrowers' bankruptcy discharge, which terminated their personal liability under the promissory note, triggered the statute of limitations within which the lender was entitled to foreclose. The court reasoned that since the borrowers owed no future payments after the discharge of their personal liability, the date of their last-owed payment kick-started the deed of trust's final limitations period.

The same outcomes were reached by the Federal Courts in *Silvers* and *Jarvis.* In *Silvers,* the court reasoned that because the bankruptcy discharge relieved the borrowers' personal liability on the note, no future payments were owed and no installments capable of triggering the limitations period remained. Accordingly, the court held that the six-year limitations period accrued at the time of the borrowers' last missed payment preceding their discharge of personal liability.

In *Jarvis*, the court actually granted the borrowers motion for summary judgment and quieted title pursuant to RCW 7.28.300 in borrowers' favor and against Fannie Mae, finding that the borrowers' bankruptcy

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discharge order triggered Washington's statute of limitations for foreclosure. The court noted that "[t]he [bankruptcy] discharge ... alert[s] the lender that the limitations period to foreclose on a property held as security has commenced" and that "[t]he last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs ... at the payment owed immediately prior to the discharge of a borrower's personal liability in bankruptcy, because after discharge, a borrower no longer has forthcoming installments that he must pay."

The court rejected Fannie Mae's public policy argument that "tying the discharge of a borrower's personal liability to a lender's right to enforce a deed of trust would automatically accelerate future installments secured by the deed of trust without the lender's consent and to the borrower's detriment." Instead, the court found that Washington law supported the termination of Fannie Mae's secured interest under RCW 7.28.300:

> *The discharge of a borrower's personal liability on his loan—the cessation of his installment obligations—is the analog to a note's maturation. In both cases, no more payments could become due that could trigger RCW 4.16.040's limitations period. The last-owed payment before the discharge of a borrower's personal liability on a loan is the date from which a secured creditor has six years to enforce a deed of trust securing the loan.*
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> *The Jarvises stopped repaying their loan, Fannie Mae did not accelerate their obligation, and the Bankruptcy Court discharged their debts on February 23, 2009. They did not reaffirm. Their last installment payment owed, therefore, was the one immediately prior to their discharge. Over six years passed between that date and the date they filed for quiet title, February 11, 2016. RCW 4.16.040 forecloses Fannie Mae's right to enforce the deed of trust against them.*

This result clearly demonstrates the potential danger to secured lenders in situations involving accounts discharged in bankruptcy and makes it imperative that lenders and servicers remain vigilant in tracking all of such discharged accounts to ensure that their security interests remain protected. This is especially important in situations where the borrowers, having obtained orders discharging their debts, continue to make monthly payments on their loans, thus precluding foreclosure.

While the *Jarvis* court noted that, following bankruptcy, "a borrower and a lender may agree to reaffirm or renegotiate the borrower's dischargeable debt," clearly more effort is needed, as the borrowers are not required to agree to reaffirm their debt and/or to re-negotiate. Accordingly, in situations where the borrowers continue making their monthly payments (or at least a portion of them), we recommend tracking the file and discussing the lender's options with an attorney *before* the statute of limitations expires rendering the security unenforceable. On the other hand, in situations where the borrowers remain delinquent on their payments, we recommend that lenders ensure that the foreclosure proceedings are initiated before the expiration of the six-year statute of limitation period.

Authors' Note: While the purpose of this article is to discuss Washington State law, the analysis herein could be equally applicable to any state which has laws governing statute of limitations on foreclosure.

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