WFZ LEGAL UPDATE

STATUTE OF LIMITATIONS ISSUES

IN THE PACIFIC NORTHWEST AND SOUTHWEST

(Avoiding the SOL Bar Through Waiver of Acceleration and Tolling)

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CHALLENGES TO MORTGAGE lenders and servicers ("Servicers") right to foreclose based on the expiration of the statute of limitations ("SOL") are rapidly increasing in the Pacific Northwest and Southwest regions. Consumer attorneys are now representing Borrowers in a winner-take-all bid to avoid repayment of their home loan and simultaneously prevent Servicers from ever foreclosing and recovering the principal owed. However, two strategies for defeating these claims are now gaining acceptance - waiver of acceleration and tolling due to bankruptcy.

As a brief reminder, 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 property to the borrower or owner free and clear of the Deed of Trust. A notice from theServicer declaring the loan to be in default and that all sums are immediately due generally commences the SOL (*i.e.* acceleration).

WAIVER OF ACCELERATION

Borrowers and their attorneys tend to focus on a long-ago acceleration of the Loan and the lack of any authority (contractual or otherwise) for a Servicer to unilaterally waive, cancel or decelerate the same. Often, the Servicer's records will not reflect an express deceleration but, instead, the commencement or cancellation of foreclosure activities and mailing the requisite notice of default and intent to accelerate. Both of these activities are key to demonstrating that any prior acceleration was waived by *implication*.

Courts in Arizona substitute the term "waiver" of acceleration with "revocation," but the concept is the same. "[R]evocation of acceleration may occur when a lender commits an affirmative act to revoke acceleration."[1] The requisite "affirmative act" would be any act "that places the borrower on actual or constructive notice of the revocation."[2] In practice, Servicers often send a "Notice of Default and Intent to Accelerate" ("Notice of Intent") when seeking to commence foreclosure. Providing this notice to Borrowers is typically required by the subject security instrument. The Notice of Intent also implies that any prior acceleration has been revoked for two reasons:

First, the Notice of Intent typically informs the Borrowers that the loan is in default and that they may bring it current by paying less than the entire loan balance. If the prior acceleration was still in effect, the demand would have been for the full amount owing, not a lesser amount.[3] Second, the Notice of Intent often states that Borrowers' failure to make payment may/will result in the acceleration of all sums due under the loan. A loan that is already in an accelerated status cannot be accelerated again without first canceling the prior acceleration.

Finally, recording cancellations of foreclosure sales is further indication that any prior acceleration was impliedly waived.

[1] *Steinberger v. IndyMac Mortgage Services*, CV-15-450-PHX-ROS (D. Ariz., Jan. 12, 2017).
[2] *Id.*

Servicers can increase their chances of successfully defending an SOL claim (under the above-discussed principles) by reviewing their loan files, extracting any Notices of Intent sent after the alleged acceleration date, and making a timeline of any bankruptcy filings affecting the loan.

TOLLING DUE TO BANKRUPTCY

Tolling under the United States Bankruptcy Code provides little relief to Servicers in the Ninth Circuit. Courts in this Circuit conclude that 11 U.S.C. § 108(c)(1) does not create a dayfor-day tolling provision, independent of state law, where the SOL does not expire during the bankruptcy.[4] Instead, where the SOL does expire during the bankruptcy, 11 U.S.C. § 108(c)(2) provides a 30 day extension of the SOL, which is nearly always insufficient. However, state law interpretation of a bankruptcy's tolling effect on the SOL may apply.[5]

The Arizona Supreme Court, for example, concluded in *In re Smith*, 101 P.3d 637 (2004), that although ministerial actions, with the primary purpose of putting parties on notice (such as affidavits renewing a judgment), were not subject to a bankruptcy stay and, therefore, were not tolled during a bankruptcy action, the automatic bankruptcy stay did stay actions that "create, perfect or enforce liens or judgments."[6] Applying this reasoning in the context of foreclosure, the United States District Court, for the District of Arizona held that because the lender's foreclosure was prohibited by the automatic bankruptcy stay, the SOL for completing the same was tolled (day-for-day) from the filing of the borrowers' bankruptcy until the automatic stay was lifted.[7]

TIPS FOR INCREASING THE CHANCE OF A SUCCESSFUL DEFENSE

Servicers can increase their chances of successfully defending an SOL claim (under the above-discussed principles) by reviewing their loan files, extracting any Notices of Intent sent after the alleged acceleration date, and making a timeline of any bankruptcy filings affecting the loan. Because a Borrowers' SOL challenge is an all-or-nothing gamble, pre-litigation resolution of these types of claims is unlikely. However, having this information readily available for review will allow Servicers or their counsel to determine if this defense strategy should be pursued.

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. a

[3] See, e.g., *Navy Fed. Credit Union v. Jones*, 930 P.2d 1007, 1009 (Ariz. Ct. App. 1996) (exercising acceleration clause means lender is "demanding full payment of the note before all installments became due").

[4] *In re Spirtos*, 221 F.3d 1079 (9th Cir. 2000); see also *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993).

[5] *Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991) ("Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business. Some states do -- e.g., Illinois, which tolls its statute of limitations during the entire bankruptcy proceeding, Ill. Rev. Stat. ch. 110 para. 13-216.")

[6] *Smith*, 101 P.3d at 639.

[7] *Mlynarczyk v. Wilmington Sav. Fund Soc'y FSB*, No. CV-15-08235-PCT-SPL, 2016 U.S. Dist.LEXIS 87462, at *16 (D. Ariz. Apr. 29, 2016).