How Delay Can Push Law's Limits

The statute of limitations, as it applies to late payments, does not present a serious practical problem.

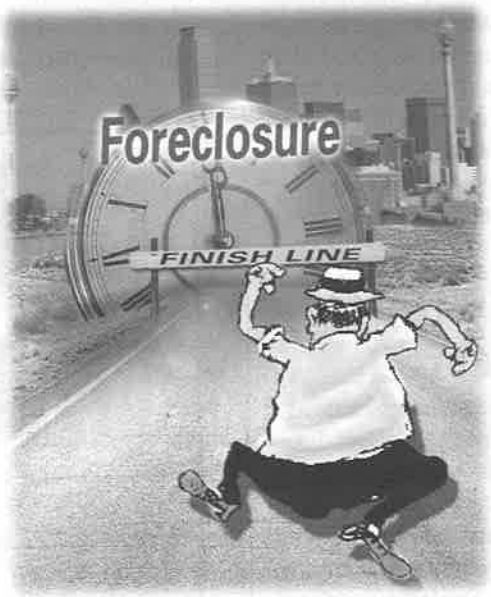
BY BRUCE J. BERGMAN

Everyone has heard of the statute of limitations, one of those legal doctrines that, in theory, can present a problem - but if it ever happens, it involves the other guy. Anyway, it sounds like it should not have much application to mortgage foreclosures. After all, lenders and servicers are not prone to twiddling their thumbs for years on end simply ignoring defaulting borrowers.

The statute of limitations applicable to a mortgage in New York, for example, is six years - certainly a lengthy enough period for a servicer to act before the law would bar the ability to collect the debt. While that is certainly true, here the proverbial "the devil is in the details" allows room for a potentially disastrous problem.

Using New York as an example of the warning, there are some basic concepts to consider. If a mortgage installment is due today, but is unpaid, because of the statute of limitations it will be uncollectible - and the mortgage unenforceable - six years from now. Of course, the length of these statutes varies in the different states, but there is some consistency in the concept that it is the *installment* that can no longer be pursued.

But the installment due next month (and each payment due thereafter) is still viable and reachable six years from today. While six years and one month from today that next installment will also be lost, it should be apparent why the statute of limitations, as it applies to late payments, does not present a serious practical problem. The lender or servicer would essentially have to ignore its rights interminably to be shut out of collection completely.



The real peril involves acceleration of the debt, and the key concept to recognize is that the entire mortgage debt becomes due upon acceleration. Of course, that is precisely the purpose of acceleration - to render installments irrelevant and instead to demand payment of the full debt.

Along with the noted helpful principle is the like idea that the statute of limitations begins to run on the complete debt from the moment of acceleration. So (in New York), if a servicer accelerated and then simply forgot about that loan for six years, foreclosure would be barred. (This is likely to apply in other states, with the sole variation being the length of the applicable statute of limitations.)

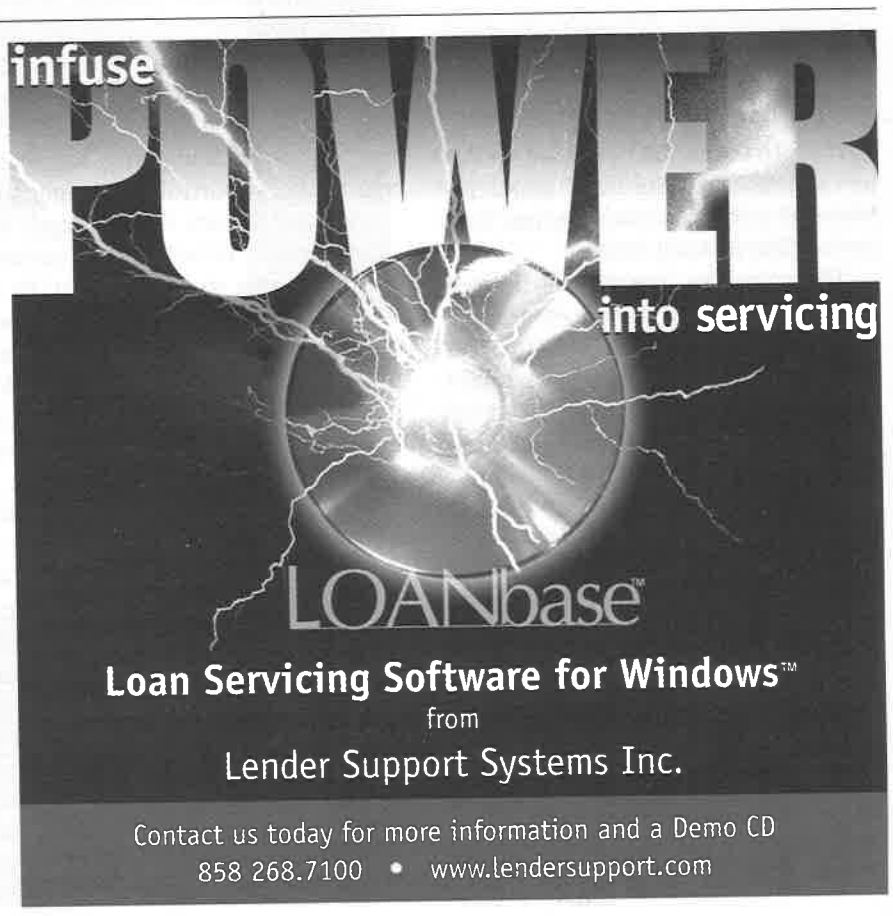
Problem solved?

Still, this doesn't seem like an area of danger because lenders are no more likely to forget about an account after acceleration then they would after an installment default. Even if there is a delay of months, or a year or two, eventually a foreclosure will begin, and that halts the running of the statute of limitations. Problem solved.

What happens, though, if it becomes heavily litigated and confused after a foreclosure is begun? The file is an incomprehensible mess and the mortgage is then assigned, perhaps a few times.

So far this is not such an unfamiliar scenario. Assume further that for whatever reason (and there could be more than a few) the foreclosure is dismissed. If when the foreclosure disappears the acceleration does also, the statute of limitations is running only on past-due installments, not the entire debt. If, however, the acceleration remains in force despite dismissal of the foreclosure action, the statute of limitations continues to proceed on to the full mortgage obligation. So, if duration of the foreclosure used up the statute of limitations, all would be lost.

Could this latter scenario ever happen? The answer is yes. It has occurred twice in New York (in reported cases - no doubt more often unreport-



ed), and mortgage holders lost everything, on this theory. Although an acceleration *can* be revoked by some affirmative act on the part of the mortgage holder, when the court dismisses an action, that is not such an affirmative act. Rather, the statute of limitations continues to run.

That this actually happens in life is highlighted by examining the events in two actual cases. In one, a mortgage was executed in November 1970. Based upon a default in remitting the mortgage installment due on March 1, 1973, the assignee of the mortgage accelerated and instituted foreclosure in May 1974. By December 1976, the action was marked off the trial calendar and one year later the case was deemed dismissed.

In 1979 the mortgage was again assigned. Apparently, it wasn't until 1992 that the last assignee became aware that the mortgage had remained dormant and in default for so many years. In an attempt to salvage the situation, the assignee started a new foreclosure action.

Finding that acceleration had been accomplished in 1974 through filing the foreclosure complaint, the court ruled that the initial foreclosure had never been withdrawn by the lender, but instead was dismissed by the court. Deeming dismissal not to be an affirmative act by the lender, the court concluded that the acceleration had never been withdrawn. Therefore, since the balance of the mortgage was declared due in 1974, the six-year statute of limitations expired in 1980, and was thus a bar to the new foreclosure.

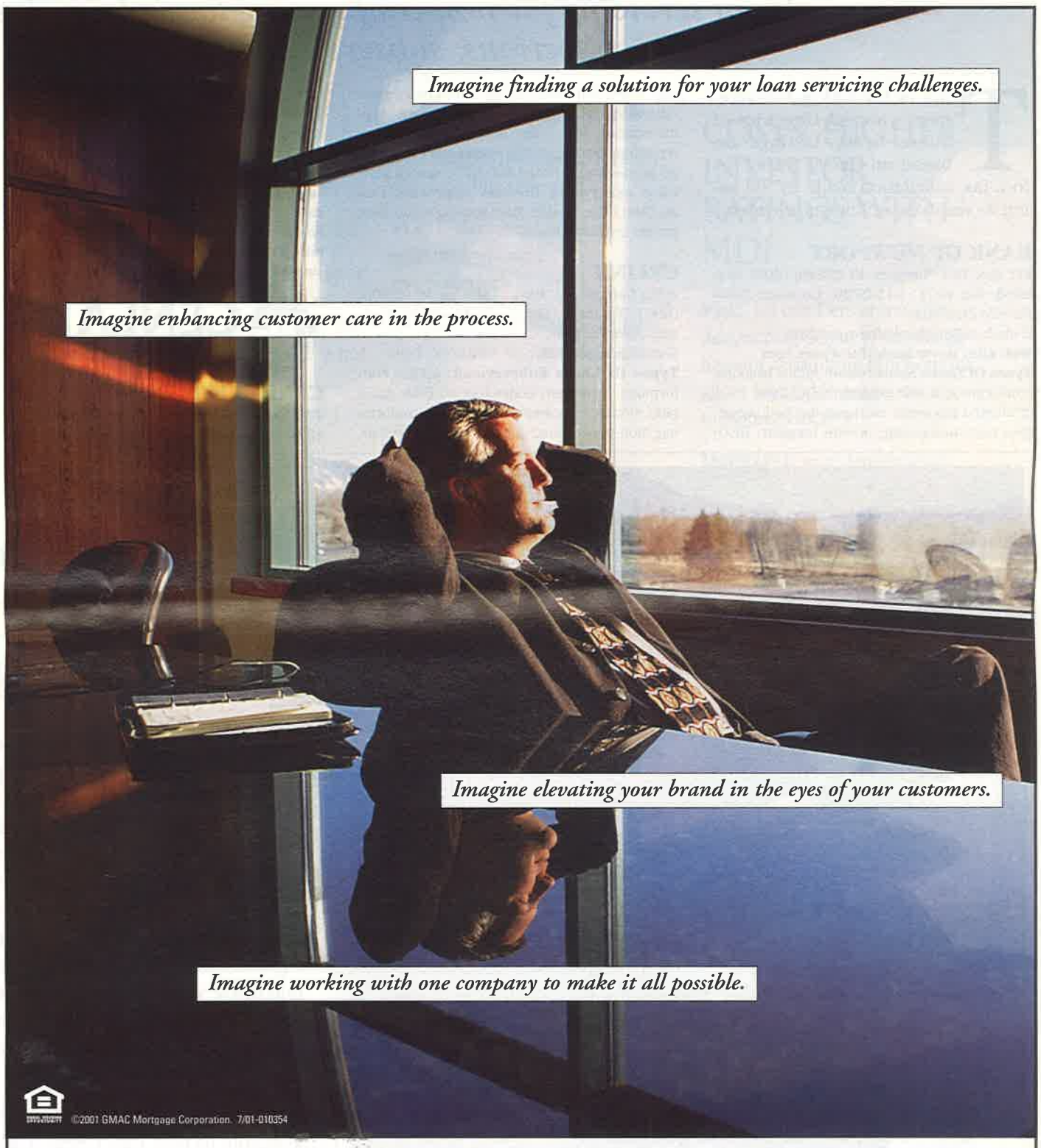
It could happen again - and did. Acceleration upon a mortgage in default was issued by letter in August 1992, and a foreclosure action on it was started in September 1992. After plaintiff's motion for summary judgment was denied, failure to appear at a court conference resulted in dismissal of the case.

The mortgage was then assigned a number of times, arriving with the final assignee in March 1997. Although a new foreclosure would have been timely at that moment, the assignee waited until February 1998 to again accelerate, but did not undertake a new action until April 1999 - eight months after the first acceleration.

Although the acceleration from 1992 could have been revoked, court dismissal of the earlier foreclosure was held not to constitute an affirmative act by the lender, revoking its election to accelerate. The foreclosure was therefore time-barred.

> ***The statute of limitations can continue to run after a court dismisses a foreclosure action.***

The lesson of all this is a sobering one, made more difficult when mortgages are repeatedly assigned. From time to time, the litigious borrower can unduly delay a foreclosure and could be successful in initially defeating it. Should that happen, very careful attention must be paid to the statute of limitations. It might still be running. If it is, quick action to either withdraw the acceleration or start a new foreclosure is critical. SM



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Bruce J. Bergman, author of the three-volume treatise "Bergman on New York Mortgage Foreclosures," Matthew Bender & Co. Inc. (revised, 2001), is a partner with Certilman Balin Adler & Hyman in East Meadow, N.Y., and an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the USFN, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.