

Watch The Statute Of Limitations

BY BRUCE J. BERGMAN

An unusual number of reported statute of limitations problems in mortgage foreclosure cases in New York suggest, for some inexplicable reason, that this potentially scary subject is worthy of renewed attention everywhere.

That this ought to be quite surprising arises from the observation that the statute of limitations is typically measured in years and is usually appropriately generous.

In New York, for example, the period of limitations is six years. Mindful of how impossible it seems that any lender or servicer would somehow ignore a mortgage default for something like a duration of six years, the assumption would be that the subject of statute of limitations is one of those technical legal nuances with which law professors can bedazzle law students - but it shouldn't have much practical application in the real world.

Surprisingly, though, the statute of limitations *does* have an actual, relevant role, and while sometimes it ensnares non-institutional lenders (who just may not know better), it can also haunt the sophisticated. One aspect of the subject we addressed more recently is the hidden problem of a timely acceleration followed by a lengthy foreclosure that is dismissed, by which time the statute of limitations has run. (See "How Delay Can Push Law's Limits - The Statute of Limitations, As It Applies to Late Payments, Does Not Present a Serious Practical Problem," *SM*, September 2001.)

But even on the more basic level, 2001 brought two more published cases in New York where a lender was in statute-of-limitations jeopardy - with one decision *for* the lender (Esther M. Mertz Trust vs. Fox Meadow Partners) and one against (Saini vs. Cinelli Enterprises).

First, a quick basic refresher on what the statute of limitations means in the mortgage case. An underlying idea of the statute of limitations is that someone's ability to enforce a right should not be available as a threat forever. It should have some ra-

tional or reasonable limit or duration.

Take, for example, a very simple one-year mortgage loan with all principal and interest due at the end of the year. The loan matures, but the lender does nothing to enforce its ability to collect the amount due. Someday, that ability will be lost, depending upon the length of the statute of limitations in the state which will have jurisdiction.

Were this New York, if the lender did nothing for six years (odd as that sounds) and then six years and three days after maturity started a foreclosure action, the borrower-defendant would rely upon expiration of the statute of limitations as a defense, and would win. The lender would collect nothing.

But then, there are events that can *extend* the statute of limitations, or stop its running altogether - precisely the points in the cases that elicited this review. How and to what extent these events have application in states other than New York is a point worthy of exploration.

Knowing that such nuances are likely to exist is in and of itself helpful.

The winning case mentioned - Mertz - emphasized two principles that should be noted and remembered:

■ Where a mortgage is payable in installments, there is a separate cause of action upon each installment for which the statute of limitations begins to run when each payment is due.

So even if a lender went to sleep six years ago (and so long as it did not accelerate the balance), only payments older than six years are lost - all else is still preserved. (If in another state the statute of limitations is two years or five years, the scenario could be the same - just with a different time period applicable.)

■ Acceleration is at the *option* of a mortgagee holder. It doesn't happen automatically. (In this case, the lender never accelerated, so all payments that became due with those six years were still available to be pursued.)

As to the frightening Saini case, where the lender lost, there are two additional principles to observe:

■ A partial payment can extend the statute of limitations. But the payment must be of an admitted debt accompanied by circumstances representing an absolute acknowledgment by the debtor of more being due from which a promise to pay the balance can be inferred. In this case, it was the receiver (not the debtor) who made the partial payments, and that wasn't good enough to revive the statute of limitations.

■ A written promise to pay the debt will also serve to revive the running of the statute of limitations and save the day for the lender or servicer. Unfortunately, the borrower's listing the mortgage in a schedule of secured claims in a bankruptcy petition is not the variety of writing that extends the statute of limitations.

The number of cases addressing mortgage foreclosure statute of limitations issues - at least in New York - is inexplicably high in recent times. We will not venture an explanation as to why that is so, but the fact should certainly give rise to the warning that lenders and servicers need to be both knowledgeable and vigilant about this subject. **SM**

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