

Consumer Financial Services Update

Recently-Published Opinions Affirm A Lender's Right To Seek All Unpaid Mortgage Payments

March 15, 2019

Appeals Courts Move Closer to Unanimous Position

The Second District Court of Appeal for the State of Florida (the Second District) issued an opinion this week which affirms a lender's right to collect all accelerated unpaid payments in a foreclosure action. In so doing, the Second District moved into alignment with the Third, Fourth, and Fifth District Courts of Appeal on this issue.

The Post-*Bartram* Unpaid Payment Collection Landscape

In the landmark case of *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009, 2020 (Fla. 2016), the Florida Supreme Court ruled that if a lender's foreclosure action is unsuccessful, the lender still has the right to file subsequent foreclosure actions and to seek acceleration of the entire debt, so long as they are based on separate defaults. What remained unclear was whether a lender still had the right to collect on unpaid payments which occurred more than five years prior to the filing of a foreclosure action. To address this concern, some lenders would "move up" default dates which fell outside five years to within five years of the filing of a new foreclosure action, regardless as to when the actual default date occurred.

Shortly thereafter, two opinions (*U.S. Bank, N.A. v. Diamond*, 228 So. 3d 177 (Fla. 5th DCA 2017) and *Velden v. Nationstar Mortgage, LLC*, 234 So. 3d 850 (Fla. 5th DCA 2018)), both issued by the Fifth District Court of Appeals for the State of Florida (Fifth District), ruled a lender did not have a right to collect missed payments which occurred more than five years prior to the filing date of the current foreclosure lawsuit.

However, the Fifth District then receded from these opinions in *Grant v. Citizens Bank, N.A.*, Fla. App. LEXIS 18659 (Fla. 5th DCA 2018), ruling that a delay in accelerating a debt does not preclude a mortgagee from collecting payments due more than five years prior. Both the Third and Fourth District Courts of Appeal for the State of Florida respectively held similarly in *Gonzalez v. Federal National Mortgage Ass'n*, 2018 Fla. App. LEXIS 10786 (Fla. 3d DCA 2018) and *Bank of America, N.A. v. Graybush*, 253 So. 3d 1188, 1193 (Fla. 4th DCA 2018).

The Second District Is Now Aligned With Its Sister Courts

On March 13, 2019, the Second District issued its written opinion in *Grdic v. HSBC Bank USA, N.A.*, 2019 Fla. App. LEXIS 3829 (Fla. 2nd DCA 2019), which adopted the recent rulings from its sister courts. In *Grdic*, HSBC Bank USA, N.A. (HSBC) filed a foreclosure lawsuit on October 16, 2014, seeking to collect on missed payments since June of

2008. After a final judgment of foreclosure was entered in favor of HSBC which awarded the lender all amounts due, including those unpaid payments dating back to 2008, the borrower filed an appeal arguing that payment defaults which occurred more than five years prior to a lawsuit being filed should be eliminated from any foreclosure judgment. The Second District rejected this argument, and in support cited to the decisions on this very subject issued by its sister courts. Similar to the mortgagees in *Gonzalez*, *Grant*, and *Graybush*, HSBC in *Grdic* was entitled to seek recovery of the entire unpaid debt because the note at issue afforded HSBC the right to accelerate the entire unpaid debt in the event of default, and the borrower remained in a continued state of default from the time of his first missed monthly payment (in June of 2008) up until the date when HSBC filed its foreclosure lawsuit. Importantly, *Grdic* brings the Second District Court of Appeal in alignment with the Third, Fourth, and Fifth District Courts of Appeal of Florida on this issue.

Action Item

This decision brings Florida courts closer to a unanimous view on whether a lender can collect unpaid debt that became due more than five years prior to filing a lawsuit, and signals that a lender should not have to waive a portion of its damages due to the passage of time, as has been the recent practice for many lenders. If the debt instrument provides a lender with the right to accelerate the entire unpaid debt in the event of default, and the borrower remains in a continued state of default from the time of his first missed monthly payment, a lender has the right to collect all missed payments – regardless as to when they went unpaid.

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