PRESENTED AT

The University of Texas School of Law
49th Annual William W. Gibson, Jr. Mortgage Lending Institute

September 17-18, 2015, AT&T Conference Center, Austin, TX
November 5-6, 2015, Cityplace Conference Center, Dallas, TX

Successfully Navigating the Texas Foreclosure Statute of Limitations Minefield

Jason L. Sanders
Marc D. Cabrera

Jason L. Sanders
jsanders@lockelord.com
(214) 740-8437 (W)
(214) 499-7709 (C)
Marc D. Cabrera
mcabrera@lockelord.com
(214) 740-8289 (W)
(214) 734-1494 (C)
Locke Lord LLP
2200 Ross Ave., Suite 2200
Dallas, Texas 75201
(214) 740-8000
www.lockelord.com

SUCCESSFULLY NAVIGATING THE TEXAS FORECLOSURE STATUTE OF LIMITATIONS MINEFIELD

I. INTRODUCTION

There has been a considerable increase in mortgage-related lawsuits filed in Texas to void residential liens based on the expiration of the statute of limitations to foreclose. In response to the foreclosure crisis of the mid-2000s, that some contend was caused in large part by subprime lending and the securitization of mortgages, the federal government enacted various programs and complex regulations to help borrowers avoid foreclosure. These programs and regulations, however, also contributed to substantial and lengthy delays in a mortgagee's ability to foreclose and an increase in mortgage-related litigation. This delay has brought the statute of limitations to foreclose to the forefront of mortgage-related litigation. To avoid the draconian result of a voided lien based on the expiration of the statute of limitations to foreclose, the triggering, stopping, and tolling of the limitations clock are of paramount importance in successfully navigating the foreclosure limitations minefield.

This article provides a non-exhaustive overview of the foreclosure crisis, the federal government's response thereto, and a detailed discussion of the accrual, stopping, and tolling of the statute of limitations to foreclose in Texas. The information provided herein is solely for educational and informational purposes and is not intended to constitute legal advice.

II. THE FORECLOSURE CRISIS

"The problems in the mortgage market are routinely referred to as a 'foreclosure crisis' because the level of defaults and foreclosures greatly exceed previous peak levels in the post-war era and, as a result, have drawn comparisons to the levels of distress experienced in the Great Depression." U.S. Dept. of Housing and Urban Development Office of Policy Development and Research, *Report to Congress on the Root Causes of the Foreclosure Crisis* (the "Report to Congress"), at 1 (Jan. 2010) (Section 1517 of the Housing and Economic Recovery Act of 2008 (P.L. 110-289) mandated preliminary and final reports to Congress on the root causes of the foreclosure crisis.).[1]

According to the Report to Congress:

> [B]etween late 2006 and mid-2007, the share of loans that were seriously delinquent or beginning the foreclosure process reached their highest levels since . . . the late 1970s. Since then, these rates have continued to rise sharply, and, by mid-2008, had more than doubled the previous record highs. Most of the initial increase in foreclosures was driven by subprime loans,[2] both due to the fact that these inherently risky loans had come to account for a much larger share of the mortgage market in recent years and because the foreclosure rates among these loans were rising rapidly. In addition, 'Alt-A' loans,[3] another fast-growing segment of the market, began experiencing higher delinquency and foreclosure rates. In both the subprime and Alt-A market segments, foreclosures have grown most rapidly among adjustable-rate loans. But, as the economy deteriorated in 2008 and into 2009, the level of foreclosures among prime fixed-rate loans also rose, further exacerbating the crisis.

Id. at vi.

In addition to subprime lending, another cause of the foreclosure crisis has been attributed to the emergence of the "securitization" of "subprime and other non-prime residential loans, along with the resecuritization of the resulting mortgage-backed securities." Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257 (2009). Securitization "encouraged market participants to push risk to the very edge of what the applicable market standards would tolerate, to make the largest, riskiest loans that could be sold on Wall Street, to bundle them using the fewest credit enhancements rating agencies would permit, and then to repeat the securitization process with many of the lower-rated mortgage-backed securities that resulted." *Id.* In other words, through securitization, "subprime lenders could make loans and sell them on Wall Street, where investment houses marketed securities backed by pools of subprime loans .

---

[1]http://www.huduser.org/portal/publications/foreclosure_09.pdf.

[2]Subprime loans generally refer to "'loans to borrowers who have significantly higher credit risks' than prime borrowers." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 715 (2d Cir. 2013). Therefore, subprime loans "tend to come with a higher degree of credit and default risk than other mortgages . . . ." *Id.*

[3] "The term 'Alt-A' refers to loans made to borrowers that require little or no documentation of . . . income or assets and entail other features that may expose borrowers to large increases in loan payments over time." *Report to Congress on the Root Causes of the Foreclosure Crisis*, at vi n.1.

. . [allowing] subprime lenders [to] quickly unload much of the risk of the subprime loans as well as recoup the money lent and relend it to new subprime borrowers." *Id.* at 1259. The "greater access to broader capital markets brought by securitization not only expanded the amount of funding available for mortgages but also brought investors with a broader range of risk preferences and tolerances and so helped expand the range of mortgage products available." Report to Congress, at 31.

Although "there is disagreement among scholars, the general consensus is that subprime lending and securitization of mortgages were significant contributors to the mortgage crisis." Arsen Sarapinian, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 64 HASTINGS L.J. 905, 910-11 (2013) (citing Kathleen C. Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure and Next Steps* 15-19 (2011) (discussing how subprime lending, securitization, and weak government oversight led to the mortgage crisis); *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. at 1276 (securitization was a major cause of the subprime meltdown); Raymond C. Niles, *Eighty Years in the Making: How Housing Subsidies Caused the Financial Meltdown*, 6 J.L. ECON. & POL'Y 165 (2010) (housing subsidies significantly contributed to the mortgage crisis); William Poole, *Causes and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL'Y 421, 425 (2010) (government encouraged the growth of the subprime mortgage market by attempting to increase home ownership); Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1 (2009) (subprime lending was a contributor to the mortgage crisis)).

III. FEDERAL GOVERNMENT AND BORROWER RESPONSE TO THE FORECLOSURE CRISIS

In the wake of the foreclosure crisis, the federal government enacted various programs and regulations designed to assist borrowers in avoiding foreclosure. *See Penermon v. Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 992 (N.D. Cal. 2014) ("In response to [the foreclosure] crisis, loan modifications became a matter of national policy, and the federal government enacted various programs designed to assist borrowers in avoiding foreclosure."). These programs and regulations, however, contributed to significant and protracted delays in a mortgagee's ability to foreclose and an increase in mortgage-related litigation, thereby naturally bringing the statute of limitations to foreclose to the forefront of such litigation.

A. Making Home Affordable Program

To help borrowers avoid foreclosure, in February 2009, President Obama introduced the Making Home Affordable Program ("MHA"), which was a part of the $700 billion Troubled Asset Relief Program ("TARP") bailout.[4] The MHA, among other things, provided resources to two primary programs: (1) the Home Affordable Refinance Program ("HARP"), which, when introduced, allowed borrowers current on their mortgages to refinance existing Fannie Mae or Freddie Mac loans up to 125% of the current value of the home;[5] and (2) the Home Affordable Modification Program ("HAMP"), requiring participating servicers to reduce monthly mortgage payments to no more than 38% of a borrower's gross monthly income, after which the federal government, using TARP funds, would reduce the monthly payments to no more than 31% of the borrower's gross monthly income.[6] HAMP also set forth guidelines for evaluating requests for loan modifications and implementing those modifications.[7]

B. Dodd-Frank

In July 2010, as a response, in part, to the foreclosure crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was signed into law. Matthew F. Carroll, *The Dodd-Frank Act and the Changing Landscape of Alabama Mortgage and Foreclosure Litigation*, 75 THE ALABAMA LAWYER 166, 167 (2014). Dodd-Frank amended a number of federal consumer protection statutes affecting borrowers, including the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1631, *et seq. Id.* Dodd-Frank also created a new federal agency, the Consumer Financial Protection Bureau ("CFPB"), to promulgate regulations to interpret and enforce both the new requirements of Dodd-Frank, as

[4] *See* Marc Gans, *HAMP: Doomed from the Start*, 10 CORNELL REAL ESTATE R. 54, 55 (2012).

[5] http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Authorizes-Fannie-Mae-and-Freddie-Mac-to-Expand-Home-Affordable-Refinance-Program-to-125-Percent-Loan-to-Value.aspx.

[6] Gans *supra* note 4.

[7] http://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf.

Title search: Successfully Navigating the Texas Foreclosure Statute of Limitations Minefield

Also available as part of the eCourse
Residential Lending Hot Topics: POA’s, Reverse Mortgages & Truth in Lending

First appeared as part of the conference materials for the
49th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Successfully Navigating the Texas Foreclosure Statute of Limitations Minefield"