

# Residential Litigation Update: Statute of Limitations Issues & Texas Home Equity Loans

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## Foreclosure Statute of Limitations

- TEX. CIV. PRAC. & REM. CODE § 16.035
  - § 16.035(a) Judicial: Must file suit w/in 4 yrs
  - § 16.035(b) Power of Sale: Must complete sale w/in 4 yrs
  - § 16.035(d) Lien becomes void upon expiration of SOL
    - Accrual = maturity. Either organic or via acceleration
      - "Effective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).
  - **Important Distinction:** Mortgages must simply bring suit for judicial foreclosure within 4 years. However, mortgagees must COMPLETE a nonjudicial foreclosure within 4 years.
- **Tip:** Don't forget to challenge accrual
  - Borrower sometimes pleads did not receive notices
  - Notices sometimes lost with servicing transfer
  - *Developing:* Potential argument no accrual for foreclosure under Texas home equity lien until Rule 736 order obtained

# Abandonment of Acceleration

- Statutory: A lender may send borrower written notice of rescission of acceleration. TEX. CIV. PRAC. & REM. CODE § 16.038.
- Abandonment can also occur by actions or agreement. *Holy Cross Church v. Wolf*, 44 S.W.3d 562 (Tex. 2001)
  - Lender accepts payment
    - *Holy Cross*, 44 S.W.3d at 566-67
    - *Justice v. Wells Fargo Bank, N.A.*, 674 Fed. Appx. 330, 335 (5th Cir. 2016), as revised (Mar. 22, 2017)
  - Parties modify loan to bring current
    - *E.g., DeFranceschi v. Seterus, Inc.*, No. 4:15-CV-870-O, 2016 WL 6496327, at \*2 (N.D. Tex. Oct. 25, 2016)
  - New notice of default/ notice of intent to accelerate
    - *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 106 (5th Cir. 2015)
    - *NSL Prop. Holdings, LLC v. Nationstar Mortgage, LLC*, 02-16-00397-CV, 2017 WL 3526354, at \*5 (Tex. App.—Fort Worth Aug. 17, 2017, no pet.)

# Actions that Do Not Constitute Abandonment

- No abandonment:
  - Sending new notice of acceleration without new notice of intent to accelerate
    - *PNC Bank Nat'l Ass'n v. Fisher*, No. 4:15-CV-01217, 2017 WL 2819893, at \*3 (S.D. Tex. June 28, 2017)
  - Merely offering a loan modification
  - **TRAP.** Accepting payments under (1) forbearance agreement that reserves acceleration or (2) bankruptcy plan
    - *Residential Credit Solutions, Inc. v. Burg*, No. 01-15-00067-CV, 2016 WL 3162205 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.)
    - *Hardy v. Wells Fargo Bank, N.A.*, 01-12-00945-CV, 2014 WL 7473762, at \*5 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, no pet.) (bankruptcy)
  - Acceleration was not optional (*e.g.*, death for HECM)

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