

**THE SUPREME COURT OF FLORIDA**

Case No: SC16-1680

SECOND DCA CASE NO.: 2D15-3186

LOWER TRIBUNAL NO.: 13-CA-708

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**BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.**

Petitioner

v.

**THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK,  
as trustee for the holders of the certificates, First  
Horizon Pass-Through Certificates Series FHAMS 2007-FA4, by  
First Horizon Home Loans, a division of First Tennessee Bank  
National Association, Master Servicer, in its capacity as agent  
for the trustee under the pooling and servicing agreement, and  
Barry Graham**

Respondents

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**INITIAL BRIEF OF THE PETITIONER**

**BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.**

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STATEMENT OF THE CASE

Following this Court's resolution of the case of Bartram v. U.S. Bank Nat'l Ass'n, --- So.3d --- 2016 WL 6538647 (Fla. 2016), the issues relating to the impact Florida's statute of limitations has on mortgage foreclosures is almost completely resolved. However, while Bartram allows a mortgagee to bring subsequent foreclosure actions following a dismissal of a prior foreclosure action, the issue of what default must be pled in the subsequent foreclosure action has not been resolved in Florida. While courts interpreting the statute of limitations and applying Singleton v. Graymar Associates, 882 So.2d 1004 (Fla. 2004) have said that a subsequent foreclosure action had to be based upon a default occurring during the limitations period, courts have disagreed on what within the limitations period means. That is the issue in this appeal.

Foreclosure actions brought in Florida are subject to a five-year limitations period pursuant to Section 95.11(2)(c), Florida Statutes. While the law is clear on what is the applicable law for applying the statute of limitations, courts have reached conflicting results when determining whether an action was brought within the limitations period when a mortgagor brings a subsequent foreclosure action. The Second

District Court of Appeal in Bollettieri Resort Villas Condo. Ass'n, Inc. v. The Bank of New York Mellon, 198 So.3d 1140 (Fla. 2d DCA 2016) and the Fifth District Court of Appeal in Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957 (Fla. 5th DCA 2015) reached different conclusions when faced with the issue of what it means to bring a subsequent foreclosure action within the limitations period. The Hicks Court's rationale was subsequently followed by the Third District Court of Appeal in Collazo v. HSBC Bank, USA, N.A., --- So.3d --- 2016 WL 6246446 (Fla. 3d DCA 2016), albeit relying on different cases to reach the result.

It is the certified conflict between these two cases and the different conclusions each court reached that brings the current case before this Court. In resolving this conflict, this Court will have to answer two questions.

The first question that this Court must resolve is what does "within the limitations period" mean. Does "within the limitations period" mean that a subsequent foreclosure action can be based upon any default, even those older than five years' old, as long as a continuing default is alleged or that the default alleged must be within the five-year limitations period? If the answer to the question is the default alleged must be

within the five-year limitations period, then this Court must decide what is the consequence of bringing a subsequent foreclosure action outside of the limitations period. Is the consequence simply requiring the trial court to amend the final judgment amount and removing some interest, or is the trial court required to dismiss the case without prejudice and allow the mortgagee to bring a subsequent foreclosure action within in the limitations period?

In this appeal, Barry Graham ("Graham") executed and delivered a Promissory Note and Mortgage securing Unit K-101 in Bollettieri Resort Villas Condominium to First Horizon Home Loan Corporation in the original principal amount of \$535,000.00 on May 24, 2007. Respondent subsequently became owner of the Note and Mortgage. Beginning September 1, 2007, Graham failed to make the required monthly mortgage payments to Respondent. Due to Graham's failure to make the monthly mortgage payments, Respondent filed its second foreclosure action to foreclose the mortgage on the Unit on January 23, 2013. At the time Respondent filed its subsequent foreclosure action, Petitioner was the legal owner of the unit through its lien foreclosure action occurring after the dismissal of the first foreclosure action against the Unit.

Respondent's predecessor in interest filed a prior foreclosure action against the same property. On February 1, 2008, a first mortgage foreclosure action against the Unit was commenced by First Horizon Home Loans. According to the Complaint in the first mortgage foreclosure action, Graham took out a loan on the Unit with an original principal balance of \$535,000.00. The unpaid principal balance stated in the complaint filed in the first mortgage foreclosure action is \$535,000.00.

Paragraph 7 of the Complaint in the first mortgage foreclosure action alleged that Graham defaulted on his mortgage when the September, 2007 monthly installment payment was not made. The first mortgage foreclosure action was voluntarily dismissed by the Plaintiff on May 19, 2011.

Respondent alleged in the complaint in the second foreclosure action that the total accelerated amount owed by Graham was \$535,000.00. The same default date of September, 2007 was alleged in the complaint. Following several motions to dismiss and court orders, Bollettieri filed its Answer and Affirmative Defenses. Bollettieri asserted in its Affirmative

Defenses that the foreclosure filed by the Respondent was barred by the statute of limitations, Section 95.11(2)(c).

Bollettieri moved for summary judgment based on the foreclosure action being barred by the statute of limitations on May 22, 2015. Respondent filed its reply on May 29, 2015. On June 16, 2015, the Trial Court heard competing Motions for Summary Judgment from Bollettieri and Respondent. Bollettieri argued that the foreclosure filed by the Respondent was barred by Section 95.11(2)(c) since it included payment defaults older than five years while Respondent argued that the payment defaults older than five years were permissible. Following argument on the competing Motions, the Trial Court entered the Final Judgment of Foreclosure in favor of the Respondent.

Bollettieri appealed the Final Judgment to the Second District Court of Appeal. After review of the briefs, and with the benefit of oral argument, the Second District affirmed the Final Judgment by holding that a foreclosure action can be based on payment defaults older than five years provided the mortgagee alleged in the complaint that the borrower was in a continuing state of default. The Court certified conflict with the Fifth District Court of Appeal's decision in Hicks which reversed a

final judgment of foreclosure and remanding for dismissal with prejudice when the mortgagee alleged in the complaint in its subsequent foreclosure action that the action was based on a default outside of the five-year limitations period.

#### SUMMARY OF ARGUMENT

"Within the limitations period" means that the breach alleged in the foreclosure complaint must be no older than five years to comply with Section 95.11(2)(c), Florida Statutes. This Court recently reaffirmed this standard in Bartram noting that when there was a dismissal without prejudice, the mortgagee could bring another suit provided it was brought within the five-year limitation period in 95.11(2)(c) and was based on a default subsequent to the dismissal. Bartram at pg. 20. This Court must settle the inter-district conflict by holding that the analysis of the Fifth District Court of Appeal in Hicks is the correct interpretation of the law and the idea of a continuing default being alleged does not provide a backdoor for a plaintiff to avoid a statute of limitations issue and quash the decision in Bollettieri.

A subsequent foreclosure action must be based upon a default that is less than five years old. Such a holding is

fundamental to the proper administration of justice in Florida because it ensures a constant application of the statute of limitations in all manner of cases, ranging from mortgage foreclosures, association lien foreclosures, fair debt collection practice violations, deceptive and unfair trade practice violations to a variety consumer finance and credit matters.

Allowing the idea of a continuing default to allow for a mortgagee or other plaintiff to plead defaults outside of the five-year limitations period eviscerates this Court's jurisprudence on limitations issues. It also allows plaintiffs to escape penalties for violating consumer protection laws, such as the Fair Debt Collection Practices Act and Florida Consumer Collection Practices Act, by following the idea of a continuing default as a valid basis for trying to collection on debts that would be barred under current statute of limitations law. If this Court does not adopt Hicks and follow its recent opinion in Bartram, then plaintiffs in Florida are free to operate with impunity and would never have to concern themselves with statute of limitations issues in any consumer credit situation.

Accordingly, this Court should approve Hicks on the conflict issue and quash Bollettieri and remand this case to the Second District for proceedings consistent with this opinion.

#### ARGUMENT

This case presents the Court with the opportunity to resolve one of the last open issues in mortgage foreclosure cases on the question of the proper application of the statute of limitations now that this Court has decided Bartram. This resolution will help clarify not only foreclosure law, but the law involving numerous consumer finance transactions and consumer protection laws like the Fair Debt Collection Practices Act and Florida Consumer Collection Practices Act.

The decisions of courts in Florida in addressing statute of limitations issues have resolved around the question of whether a subsequent foreclosure action could be brought after acceleration of the debt in the first foreclosure action. These decisions have clearly articulated the rule of law that a subsequent foreclosure action can be brought. However, when addressing the issue of bringing that subsequent foreclosure action and what can be pled, these courts have left unresolved this question by setting forth a general statement that the

subsequent action must be brought "within the limitations period". The result of the failure of courts to clearly articulate what "within the limitations period" means has led to thousands of foreclosure actions across Florida pending without clear guidance to what is a mortgagee's obligation for pleading a default under the promissory note and mortgage in their subsequent, and in many occasions the third and fourth, action.

The first issue in this case affords an opportunity to ultimately resolve what does "within the limitations period" mean and provide needed clarification for courts across Florida handling both foreclosure cases, but also consumer finance cases. The second issue provides the Court with the ability to state how a court should deal with a complaint that is based on defaults that are outside the limitations period, especially when the case proceeds to trial.

**Standard of Review.** The standard of review of a question of the application of the statute of limitations is *de novo*. "A legal issue surrounding a statute of limitations question is an issue of law subject to *de novo* review." Hamilton v. Tanner, 962 So.2d 997 (Fla. 2d DCA 2007); Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLP, (quoting Hamilton) 137 So.3d 1081 (Fla.

3d DCA 2014) and Major League Baseball v. Morsani, 790 So.2d 1071, 1074 (Fla. 2001).

**I. "WITHIN THE LIMITATIONS PERIOD" MEANS THE BREACH IN THE COMPLAINT MUST BE LESS THAN FIVE YEARS OLD PURSUANT TO SECTION 95.11(2)(C)**

The Bollettieri Court held that the Respondent's foreclosure action was not barred, despite including defaulted payments that were older than five years, because the Respondent had alleged a continuing default of all subsequent payments. To the Court, the allegation by the Respondent in its subsequent foreclosure action that the borrower was in a continuing state of default was sufficient to satisfy the requirement that a subsequent foreclosure action be based on a default "within the limitations period".

The most important inquiry when making a statute of limitations analysis is when did the right to file the action accrue. Or to put it a different way, when could the action first have been brought by the party. See Harris v. Aberdeen Prop. Owners Ass'n, Inc., 135 So.3d 365, 368 (Fla. 4th DCA 2014) ("the limitations period begins to run when the action 'may be brought.'"). See also Greene v. Bursey, 733 So.2d 1111, 1114 (Fla. 4th DCA 1999).

In Florida, a promissory note secured by a mortgage is an installment contract and each payment due under the promissory note has its own limitations period. Under an installment contract, the statute of limitations begins to run on the date that each payment is due. Therefore, the statute of limitations may potentially run on some payments while not lapsing on other payments. Greene v. Bursey, 733 So.2d 1111 (Fla. 4th DCA 1999) (citations omitted) and Locke v. State Farm Fire and Cas. Co., 509 So.2d 1377 (Fla. 1st DCA 1987). See also Monte v. Tipton, 612 So.2d 714, 716 (Fla. 2d DCA 1993) and CCM Pathfinder Palm Harbor Management, LLC v. Gendron, 198 So.3d 3, 7 (Fla. 2d DCA 2015).

"The timeliness of an action to foreclose a mortgage is controlled by Section 95.11(2)(c), Florida Statutes." Houck Corp. v. New River Ltd., 900 So.2d 601 (Fla. 2d DCA 2005). Accordingly, Section 95.11(2)(c) applies to the monthly installment payments on the mortgage, which provides for a five-year statute of limitations for each installment payment. Greene at 1114. See also Kaan v. Wells Fargo Bank, N.A., 981 F.Supp.2d 1271, 1274 (S.D.Fla. 2013). ("While any claims relating to individual payment defaults that are now more than five years old may be subject to the statute of limitations,

each payment default that is less than five years old ... created a basis for a subsequent foreclosure and/or acceleration action.”).

The five-year limitations period under Section 95.11(2)(c) means that the default pled in the complaint must be within five years from the date the complaint is filed. Evergrene Partners, Inc. v. Citibank, N.A., 143 So.3d 954, 956 (Fla. 4th DCA 2014)(claims to payment defaults older than five years may be subject to statute of limitations); U.S. Bank, Nat’l Ass’n v. Bartram, 140 So.3d 1007, 1014 (Fla. 5th DCA 2014)(subsequent foreclosure action permitted provided it is brought within the limitations period). See also In re Anthony, 550 B.R. 577 (M.D. Fla. 2016)(citing Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957, 959 (Fla. 5th DCA 2015) “...Bank is not precluded from filing a new foreclosure action based on different acts or dates of default not previously alleged, provided that the subsequent foreclosure action on the subsequent defaults is brought within the statute of limitations period found in Section 95.11(2)(c), Florida Statutes.”)

Numerous cases in Florida have held that when a subsequent foreclosure action is brought “within the limitations period”, the breach alleged in the foreclosure complaint must be no older

than five years. Torres v. Countrywide Home Loans, Inc., 2014 WL 342141 at \*4 (S.D. Fla. July 29, 2014) (internal citations omitted) "While any claims relating to individual payment defaults that are more than five years old may be subject to the statute of limitations, each payment default that is less than five years old creates a basis for a subsequent foreclosure or acceleration action." See also Stern v. Bank of America Corp., 112 F.Supp.3d 1297, 1300 (M.D. Fla. 2015).

The reason for this requirement is to ensure compliance with Section 95.11(2)(c), Florida Statutes, which provides a five-year limitations period for actions to foreclose a mortgage. This Court recently reaffirmed this standard in Bartram, noting that when there was a dismissal without prejudice, the mortgagee could bring another suit provided the subsequent suit was brought within the five-year limitation period in 95.11(2)(c) and was based on a default after the dismissal. Bartram at pg. 20.

One of the most contested cases that affirmed the requirement that a subsequent foreclosure action be based on a default within the limitations was Deutsche Bank Trust Co. Americas v. Beauvais, 188 So.3d 988 (Fla. 3d DCA 2016). After a thorough review of the law on foreclosures and whether the

statute of limitations barred subsequent foreclosure actions, the Beauvais Court held "We therefore conclude that dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default if the subsequent default occurred within five years of the subsequent action." Beauvais at 944.

In fact, the Beauvais Court spends considerable time, and cites to numerous cases, that a lender's subsequent foreclosure action must be based on defaults within the limitations period. Beauvais at 944-945. The Court also notes that "As a matter of law, appellant's 2012 foreclosure action, based on breaches that occurred after the breach that triggered the first complaint, was not barred by the statute of limitations." Beauvais at 945(internal citation omitted).

The Fifth District Court of Appeal reached the correct result in Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957, 959 (Fla. 5th DCA 2015) by stating that a mortgagee could not base its foreclosure action on payment defaults that were older than five years. The Court adhered to the prior cases decided in Florida that an action could not be based on defaults that were older than the five-year limitations period in Section 95.11(2)(c).

Unfortunately, the Second District Court of Appeal elected to provide plaintiffs, such as the Respondent, with an exception to this rule by holding in Bollettieri that defaults outside of the limitations period could provide a cause of action so long as the plaintiff alleged a continuing default. Bollettieri at 1142. Never before this decision had any court articulated for such an expansive view of the statute of limitations. It had been understood by courts that a plaintiff could not base a cause of action on an event that occurred outside of the applicable limitations period. The record before the Second District Court of Appeal was clear that that the Respondent had based its case on installment payments that were outside of the applicable limitations period.

The undisputed record before the Court clearly established that the first monthly installment payment missed by Graham was the September, 2007 payment. Applying Sections 95.11(2)(b) and 95.11(2)(c) to this installment payment, the statute of limitations for this installment payment ran on September 1, 2012. Each subsequent monthly installment payment due on the Promissory Note would continue to lapse and more importantly, be barred by the statute of limitations, until a subsequent foreclosure action was filed.

The Bank of New York was barred by the statute of limitations to bring the subsequent foreclosure action based upon payment defaults that were more than five years' old, especially when the same default date was alleged. The subsequent foreclosure action had to be based on payment defaults that were not barred by the statute of limitations and had to be a different default date. As this Court made clear in Bartram:

"While a dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default as long as the action was brought within five years of the default per section 95.11(2)(c), critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action. As the federal district court in Dorta reasoned "if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee 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." Bartram at pg. 20.

In this case, this means that any monthly installment payment where the five-year statute of limitations lapsed prior to the acceleration of the Promissory Note on with the filing of the Complaint on January 23, 2013 could not be included in the foreclosure action. Bank of New York could not base the

foreclosure on the payment defaults from September, 2007 through January, 2008 since the five-year statute of limitations had run on these monthly installment payments before the loan was accelerated. These five monthly installments were legally barred from being foreclosed upon and the Respondent was not legally able to base its Complaint on these installment payments that were barred by the statute of limitations, especially since the subsequent foreclosure action alleged the same default date as the first foreclosure action.

Allowing the Bollettieri Court's concept of a continuing default threatens to erode basic and fundamental consumer protection laws by allowing creditors/plaintiffs to claim amounts prohibited by the statute of limitation simply by alleging a continuing default. These consumer protection laws include the Fair Debt Collection Practices Act, Florida Consumer Collection Practices Act and the Florida Deceptive and Unfair Trade Practices Act.

Currently, a consumer can defend against collection efforts by asserting that a debt is barred by the statute of limitations, and more importantly, seek redress from a creditor/plaintiff for seeking amounts barred by law. For

example, a plaintiff who filed a subsequent foreclosure suit, based on payment defaults outside of the five-year limitations period, under Bollettieri would have a defense to being in violation of applicable fair debt and consumer protection laws for claiming debt older than five years and that is barred by the statute of limitations. The defense would be that Florida law allows the creditor/plaintiff to seek these amounts as long as there is a continuing default alleged.

What was once a valid defense for the consumer under the applicable consumer protection laws is undone by Bollettieri. However, Hicks avoids this issue by ensuring that consumer protection laws are not eviscerated by the concept of a continuing default.

A prime example of how Hicks allows for consumer protection laws to function in mortgage foreclosures, while still allowing mortgagees to accelerate, is the case of Sanchez v. Rushmore Loan Management Services, LLC, No. 8:15-CV-2714, 2016 WL 3126515 at \*4 (M.D. Fla. June 3, 2016). In Sanchez, the defendant (creditor/plaintiff) sent a foreclosure notice to the plaintiff (consumer/defendant) in July, 2015 and demanded payments due from April, 2009 to the present. Plaintiff filed suit against the defendant under the applicable fair debt and consumer

protection laws for a misleading letter since it did not refer to a prior foreclosure suit and acceleration.

In denying the defendant's motion to dismiss, the district court held that the letter of the defendant failed to exclude payment defaults that exceeded the five-year limitations period. The defendant could not seek installment payments greater than five years' old since those payments were barred by the statute of limitations. However, under the Bollettieri Court's rationale, the defendant in Sanchez would have a legitimate legal basis for seeking amounts that would be barred by the statute of limitations, provided it alleged there was a continuing default. The protection that the consumer had to avoid claims based on the statute of limitations disappears when a continuing default is allowed as the Second District articulated in Bollettieri.

The error in the Second District's approach in Bollettieri is epitomized by the fact that no other court has considered such an expansive evisceration of the statute of limitations. Both the Hicks Court and Collazo Court realized that the statute of limitations has to mean something and that courts are not

free to disregard a statute by creating a new exception to the application of the statute.

**II. A COMPLAINT BASED UPON DEFAULTS OUT OF THE LIMITATIONS PERIOD MUST BE DISMISSED WITH PREJUDICE, BUT WITH LEAVE TO FILE A SUBSEQUENT ACTION WITHIN THE LIMITATIONS PERIOD**

The second issue in the conflict between Hicks and Bollettieri is the conflict over what is the appropriate response for a court that is faced with a complaint that is based upon defaults that are outside of the applicable limitations period. Hicks states the appropriate remedy is dismissal while Bollettieri provides that as long as the plaintiff alleges a continuing default, then there is no issue.

The petitioner would call to the attention of this Court that while it was considering whether to accept jurisdiction of this Case, the Third District Court of Appeal released Collazo v. HSBC Bank, USA, N.A., --- So.3d --- 2016 WL 6246446 (Fla. 3d DCA 2016) following rehearing. Faced with the exact same issue as in this appeal, the same payment default date being asserted in a subsequent foreclosure action and the default date was older than five years, the Court held that the final judgment had to be reversed and the case voluntarily dismissed.

This is the exact same result the Fifth District reached in Hicks, reversal of the final judgment and dismissal of the

action. The only difference between Collazo and Hicks is the type of dismissal, without prejudice versus with prejudice respectively. The Bollettieri Court's analysis does not fit with current jurisprudence regarding the statute of limitations and is an outlier when it comes to compliance with the requirements of the pleading requirements of Section 95.11(2)(c).

This Court should reject the rationale of the Second District and adopt the holding of the Fifth District in Hicks. A subsequent foreclosure action that is based on payment defaults that are older than five years must be dismissed with prejudice. However, as both Hicks and Bartram make clear, the mortgagee can bring a subsequent foreclosure action, and accelerate the entire mortgage debt, provided it is based on payment defaults within the limitations period. This is the legally correct decision given the jurisprudence in Florida on statute of limitations issues, especially in mortgage foreclosures.

The Respondent's subsequent foreclosure action was based on a default that was outside of the applicable statute of limitations and the final judgment should have been reversed and the case dismissed with prejudice, but with instructions that

another foreclosure action could be brought provided it was based on a default within the limitations period. See PNC Bank, N.A. v. Neal, 147 So.3d 32 (Fla. 1st DCA 2013) "We affirm, but point out that the dismissal with prejudice of PNC Bank's foreclosure action against the Neals does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action."

**III. THE BOLLETTIERI COURT'S FAILURE TO GIVE SECTION 95.11(2)(c) ITS PLAIN MEANING LEADS TO AN ABSURD AND UNREASONABLE RESULT THAT DECLARES Section 95.11(2)(c) INVALID TO FORECLOSURES AND CONSUMER DEBT TRANSACTIONS AND INHERENTLY ADOPTS SECTION 95.281 AS THE LIMITATIONS PERIOD.**

Courts are required to give a statute its plain meaning of the actual language used in the statute. If the statutory language is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Diamond Aircraft Industries, Inc. v. Horowitch, 107 So.3d 362, 365 (Fla. 2013) (citing Holy v. Auld, 450 So.2d 217, 219 (Fla. 1984)). However, the Second District has failed to give Section 95.11(2)(c) its plain and obvious meaning, construing the statute in a way that leads to an absurd result.

The Bollettieri Court, in creating the concept of a continuing default, has implicitly declared invalid Section 95.11(2)(c) as it applies to foreclosure and consumer debt matters. The law currently provides that for foreclosures, the statute of limitations is governed by Sections 95.11(2)(c) and that actions brought on installment payments are barred when the applicable statute of limitations runs. Greene v. Bursey, 733 So.2d 1111, 1114 (Fla. 4th DCA 1999) (internal citations omitted).

By adopting the "continuing default" standard in Bollettieri, the Second District has effectively eliminated Section 95.11(2)(c) as being applicable to consumer debt transactions provided that a continuing default is alleged. By way of example, this means the applicable limitations period for mortgages is now the repose period in Section 95.281. It is now conceivable that a lender could bring a foreclosure action in year 29, month 10 of a 30-year mortgage and allege and collect all prior installment payments provided the lender alleged the borrower has been in default the entire time. The only bar to the lender's action would be the repose period under Section 95.281. The same result can be obtained in other consumer debt transactions such as community association assessments, credit

cards, personal loans and any other type of transaction where a consumer is obligated to make monthly installment payments.

This is an absurd interpretation of Section 95.11(2)(c) and contrary to basic statutory interpretation in Florida. See Florida Dept. of Environmental Protection v. ContractPoint Florida Parks, LLC, 986 So.2d 1260, 1270 (Fla. 2008) "We have long held that the Court should not interpret a statute in a manner resulting in unreasonable, harsh or absurd consequences".

Section 95.11(2)(c) should be given its plain meaning, which is that a five-year statute of limitation applies to actions to foreclose a mortgage and payment defaults outside of the five-year limitation cannot form the basis of a cause of action for foreclosure. The Bollettieri Court's creation of the concept of a "continuing default" leads to the absurd result of plaintiffs being able to base a cause of action on payment defaults clearly outside of the limitations period. Accordingly, the decision of the Second District in Bollettieri should be quashed.


#### CONCLUSION

Florida's long-standing jurisprudence on issues involving the statute of limitations is clear. If a complaint contains defaults that are outside of the applicable limitations period,

then the case is to be dismissed. Even considering the unique nature of mortgages and the ability to file a subsequent foreclosure action and accelerate the entire loan balance, it still does not absolve one from complying with the basic tenants that the claim must be within the limitations period. Despite the ongoing turmoil Florida's foreclosure crisis brought to the legal profession, courts remained steadfast that while multiple foreclosure action could be brought consecutively, the suits still had to comply with the statute of limitations and allege a default within the limitations period.

For the foregoing reasons, the decision below in Bollettieri should be quashed and this Court should approve Hicks on the conflict issue.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing *Petitioner's Initial Brief on the Merits* has been filed electronically with the Clerk of Court and to all parties this 28<sup>th</sup> day of November, 2016 to:

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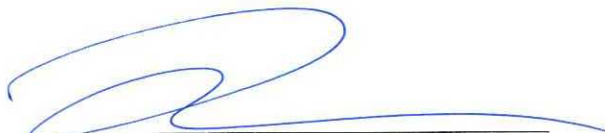
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I HEREBY CERTIFY that the foregoing complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



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