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IN THE SUPREME COURT OF FLORIDA

Case No.: SC14-1265
(Consolidated with Case Nos. SC14-1266 and SC14-1267)

L.T. Case No.: 5D12-3823

LEWIS BROOKE BARTRAM and
THE PLANTATION AT PONTE VEDRA, INC.

Appellant,

vs.

U.S. BANK NATIONAL ASSOCIATION and
PATRICIA J. BARTRAM

Appellee.

_____/

BRIEF OF THE AMICI CURIAE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, AND THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION

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STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICI

The National Association of Consumer Advocates, the National Consumer Law Center, and the Jerome Frank Legal Services Organization at Yale Law School jointly file this amicus curiae brief pursuant to Fla. R. App. P. 9.370(a).

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. NACA manages the Institute for Foreclosure Legal Assistance, and its members regularly represent homeowners facing foreclosure.

The National Consumer Law Center ("NCLC") is a national nonprofit organization that has provided resources for legal services offices, private law firms, and governmental entities in the area of consumer law since 1969. NCLC publishes nationally recognized manuals including *Foreclosure*s (4th ed. 2012); *Mortgage Lending* (1st ed. 2012); *Foreclosure Prevention Counseling* (2nd ed. 2009); and *Truth-in-Lending* (8th ed. 2012). During the current foreclosure crisis, NCLC has trained attorneys, housing counselors, and mediators on foreclosure-

related topics in more than 20 states. NCLC attorneys testify regularly before Congressional committees, federal agencies, and state legislative bodies on foreclosure- and mortgage-related topics.

The Jerome N. Frank Legal Services Organization at the Yale Law School ("LSO") is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to individuals who cannot afford private assistance. The Mortgage Foreclosure Litigation Clinic, part of LSO, has been representing homeowners fighting foreclosure in Connecticut since 2008. In that capacity, the Clinic has appeared in state and federal court proceedings at both the trial and appellate levels, and has assisted appellate courts in North Carolina, California, and Maine as a friend of the court. LSO and its clients have also testified before the Connecticut legislature on foreclosure policy.[1]

Collectively, the interest of the amici in this case is based on the Fifth District Court of Appeal's decision's direct impact on homeowners, potential home purchasers, and others who will be affected by what is now an ambiguous foreclosure statute of limitations. We are also interested to avoid a result that would exempt mortgagees from procedural rules that apply to all other civil litigants. The Fifth District's decision, by carving out an exception for mortgagees

[1] The students of the LSO are the primary authors of this brief. This brief does not reflect the views of the Yale Law School.

under Florida's statute of limitations, threatens the sanctity of title and prevents needed finality with respect to the rights of both homeowners and mortgagees. Florida's legislature shares other states' goal of protecting homeowners from uncertainty or delay in foreclosure proceedings. The Fifth District's opinion runs contrary to the purposes of statutes of limitations and to the standard rule of law. As consumer advocates, we are concerned that if allowed to stand, the Fifth District's holding will have a negative effect on Florida's consumers and will create more uncertainty in the Florida real estate economy.

SUMMARY OF THE ARGUMENT

Courts in fifteen states, along with Florida, have considered what happens after a note secured by a mortgage is accelerated, the lender brings a foreclosure suit, and that action is dismissed without prejudice. In thirteen of these states, the dismissal of the foreclosure does not automatically decelerate the note.[2]

These courts have held that a note may only be decelerated either by an agreement of the parties or, at a minimum, by an unequivocal act by the lender that puts the borrower on notice of the deceleration. There is good reason for this rule: a dismissal without prejudice leaves open the possibility that the lender will bring a subsequent foreclosure action immediately after the dismissal. A dismissal without prejudice therefore does not provide the borrower with information about what the lender understands the borrower's obligations to be under the note going forward.

[2] Eleven of these thirteen states have statute of limitations periods that are similar to Florida's, *i.e.*, six years or less. Arizona: Six years, Ariz. Rev. Stat. Ann. § 12-548 (West 2013); Arkansas: Five years, Ark. Code Ann. § 16-56-111(a); Connecticut: Six years, Conn. Gen. Stat. § 52-576(a); Louisiana: Five years, La. Civil Code Ann. art. 3498; Maine: Six years, Me. Rev. Stat. tit. 14, § 752 (2013); Nevada: Six years, Nev. Rev. Stat. § 11.190; New Jersey: Six years, N.J. Stat. Ann. § 12A:3-118(a) (West 2013); New Mexico: Six years, N.M. Stat. Ann. § 37-1-3 (West 2014); New York: Six years, N.Y. C.P.L.R. § 213 (McKinney 2012); Texas: Four years, Tex. Civ. Prac. & Rem. Code § 16.004(3) (West 2013); Washington: Six years, Wash. Rev. Code § 62A.3-118. Two states have statute of limitations periods of over six years. Kentucky: Fifteen years, Ky. Rev. Stat. Ann. Sec. 413.090 (West 2014); Ohio: Eight years, Ohio Rev. Code Ann. § 2305.06 (West 2013).

Three of the states that have addressed successive foreclosure suits and the applicability of either statute of limitations or res judicata defenses have rejected the reasoning in *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004), and instead have held that the dismissal of a foreclosure case – with or without prejudice – does not decelerate the note, but rather makes the note unenforceable on res judicata grounds.[3] The decisions of these three courts treat the effect of acceleration – accelerating the maturity date by eliminating the amortization schedule and making the entire debt due immediately – as irreversible once the foreclosure suit has been decided on the merits or dismissed with prejudice. In doing so, they are not abiding by some mere formalism, but rather are enforcing the same norm described above: borrowers should always be on notice about the status of their obligations under a note. We urge the Court to follow the majority of states that have considered this issue and conclude that dismissal without prejudice does not trigger deceleration of the note nor reset the statute of limitations.

[3] Courts in two states have adopted the reasoning of *Singleton*. Indiana, discussed *infra*, has done so in a case rejecting a borrower's argument that the statute of limitations applies. Iowa has done so only in the res judicata context.

ARGUMENT

I. THE VAST MAJORITY OF STATES WITH LAW ON THE QUESTION REJECT AUTOMATIC DECELERATION OF THE NOTE ON DISMISSAL OF A FORECLOSURE ACTION.

Courts in thirteen states – New York, New Mexico, Connecticut, Louisiana, New Jersey, Washington, Arizona, Texas, Nevada, Arkansas, Ohio, Maine, and Kentucky – have held that a dismissal without prejudice does not automatically decelerate a note.

a. New York

New York provides a highly relevant model for Florida courts on questions of foreclosure law. Like Florida, New York is a large state with a judicial foreclosure system and a significant foreclosure backlog. New York courts have consistently ruled that a debt cannot be decelerated absent a clear, affirmative act by the lender. A dismissal – with or without prejudice – cannot by itself decelerate a debt because a dismissal is not an affirmative act on the part of the lender. If a debt is accelerated and the lender chooses not to affirmatively decelerate the debt or pursue the claim within the statutorily-defined period, the claim is time-barred.

In *EMC Mtge. Corp. v. Patella*, 720 N.YS.2d 161 (N.Y. App. Div. 2001), the Second Department of the Appellate Division of the Supreme Court ruled that dismissal for failure to appear at a certification conference did not decelerate the underlying mortgage debt. Dismissal "did not constitute an affirmative act by the

lender revoking its election to accelerate." *Id.* at 163. The statute of limitations therefore continued to run from the time of the initial acceleration, and a subsequent foreclosure action begun seven years after the original acceleration was time-barred. *Id*. *See also Federal Natl. Mtge. Assn. v. Mebane*, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994) (holding that where an initial foreclosure was dismissed *sua sponte*, it was not an "affirmative act by the lender" necessary to decelerate and thus subsequent action was time-barred); *Clayton Natl. v. Guldi*, 763 N.Y.S.2d 493 (N.Y. App. Div. 2003) (mem.) (applying same reasoning to subsequent suit after dismissal for lack of personal jurisdiction). Even the voluntary withdrawal of a foreclosure suit by the lender does not serve as the clear and affirmative act necessary to decelerate a mortgage. *See Arbisser v.* Gelbelman, 730 N.Y.S.2d 157 (N.Y. App. Div. 2001), appeal denied, 97 N.Y.2d 612 (2002).

New York has developed a clear rule: a dismissal of a foreclosure action, regardless of the nature of that dismissal, does not constitute deceleration of the debt. Deceleration requires a clear and affirmative act by the mortgagee; absent such an act, the statute of limitations runs from the time of acceleration, notwithstanding the filing or dismissal of a foreclosure suit.

b. Connecticut

Connecticut's Appellate Court has held that dismissal of a foreclosure action does not constitute deceleration of the note. For this reason, a foreclosing plaintiff

does not need to provide a second notice of acceleration before commencing a second foreclosure action. *See Fid. Bank v. Krenisky*, 807 A.2d 968 (Conn. App. Ct. 2002), *appeal denied*, 811 A.2d 1291 (Conn. 2002). The court stated that "the [trial] court's dismissal of the first foreclosure action did not wipe the slate clean, so to speak, for the defendants because they already had been notified of their default and the mortgage debt already had been accelerated. The debt, therefore, remained accelerated. To rule otherwise would nullify the effect of the acceleration clause." *Id.* at 975. As in the instant case, the bank's initial foreclosure action had been dismissed due to lack of prosecution. The court appropriately recognized that this type of dismissal does not constitute a reversal of the acceleration by the bank.

c. Louisiana

A Louisiana appellate court concluded, in *Harrison v. Smith*, 814 So. 2d 42, 44 (La. Ct. App. 2002), that a dismissal without prejudice of a foreclosure action does not decelerate a note. The original note holder accelerated the note and brought foreclosure proceedings. That suit was dismissed without prejudice after a relative of the mortgagor purchased the note and mortgage from the original note holder. *Id.* Several years later, this relative brought a new foreclosure action, and the mortgagor argued, *inter alia*, that the action was barred by Louisiana's five-year liberative prescription. *Id.* The Louisiana Court of Appeals, First Circuit, held that the dismissal without prejudice "merely leaves the situation, as to that cause of

action, as if no suit had ever been filed upon it," and found "no legal basis to construe this principle of restoring matters to their former status upon dismissal of a suit without prejudice to mean that a note once accelerated will be reinstated as if it were not accelerated." *Id.* at 46 (internal citation omitted).

d. Washington

In a recent, unpublished opinion, the Court of Appeals of Washington held that where a foreclosure is dismissed without prejudice for failure to prosecute, the statute of limitations continues to run notwithstanding that dismissal. The facts in *Kirsch v. Cranberry Fin., LLC*, 178 Wash. App. 1031 (Wash. Ct. App. 2013) closely resemble those before this Court. The defendant, Kirsch, had granted a deed of trust on his personal residence to secure a small business loan. After Kirsch defaulted in 2000, Cranberry's predecessor in interest filed suit for foreclosure in 2004. In its complaint, Cranberry's predecessor "unambiguously exercised its option to accelerate." *Id*. The court dismissed the suit five years later, in 2009, for "want of prosecution." In 2012, Kirsch filed a suit to quiet title.

The Washington Court of Appeals was therefore faced with the question before this Court: "[W]hether the court clerk's dismissal of the 2004 complaint for want of prosecution under [the relevant rule of civil procedure] nullified the acceleration's effect for purposes of the statute of limitations." *Id.* The Court of Appeals held that where the prior dismissal was not an adjudication on the merits,

the statute of limitations continued to run from the initial acceleration. "Because Cranberry's predecessors accelerated the debt and the 2004 lawsuit's dismissal had no effect on the notice given to Kirsch, Cranberry or its predecessors were required to file suit within six years after the accelerated due date . . . ." *Id.* (quotation omitted). The court therefore allowed Kirsch's quiet title action. *Id.* Although not cited in *Kirsch*, the Washington Court of Appeals had previously concluded that a dismissal without prejudice did not affect the acceleration of the note nor the statute of limitations in a case presenting a slightly different set of facts. *See TPM Holdings, Inc. v. Swann*, 85 Wash. App. 1089 (Wash. Ct. App. 1997).

e. New Jersey

In *Gordon A. Washington v. Specialized Loan Servicing* (*In re Gordon A. Washington*), No. 14-14573-TBA, Doc. 28 (Bankr. D.N.J. Nov. 5, 2014), the Bankruptcy Court for the District of New Jersey held that a dismissal without prejudice does not stop the New Jersey statute of limitations from running. The note holder first accelerated the note on June 1, 2007 and filed a foreclosure action on December 14, 2007. *Id.* at 21. On July 5, 2013, the Superior Court dismissed the foreclosure without prejudice for lack of prosecution. *Id.* at 10. When the note holders filed a proof of claim in bankruptcy on July 17, 2014, thereby seeking recovery of the note in a different forum, the bankruptcy court held that New

Jersey's six-year statute of limitations for suits on negotiable instruments barred the claim. *Id.* at 23.

f. Arizona

An Arizona appellate court has also concluded that the running of the statute of limitations for a foreclosure action is unaffected by a subsequent dismissal of that suit. In *Wood v. Fitz-Simmons*, No. 02-CA-CV-2008-0041, 2009 WL 580784 (Ariz. Ct. App., Mar. 6, 2009), the court held that "[i]n the case of a promissory note . . . the statute of limitations begins to run when the debt comes due . . . . And the debt is due . . . on the date the creditor exercises the optional acceleration clause." *Id*. at *2. The court explained why the dismissal of the foreclosure suit did not affect the statute of limitations, stating that "[a]n affirmative act by the lender is necessary to revoke the acceleration of a debt once that option has been exercised. And, where a debt has been accelerated by the filing of a lawsuit, a trial court's dismissal of the action is not by itself sufficient to revoke the acceleration and extend the limitations period." *Id.* (internal citations omitted).

g. Texas

In Texas, a court's dismissal of a foreclosure action does not automatically decelerate the note. As in New York, deceleration requires a lender's clear affirmative act. Deceleration is never the automatic consequence of a court action.

Murphy v. HSBC Bank USA, No. H–12–3278, 2014 WL 1653081 (S.D. Tex., April 23, 2014) – the facts of which bear a strong resemblance to the case before this Court – illustrates this rule clearly. There, the lender accelerated the note and filed an application for expedited non-judicial foreclosure in June 2008. That case was abated and dismissed without prejudice in November 2008 pursuant to a Texas procedural rule. *Id.* at *2. Then, in August 2012, the lender filed a second application for expedited non-judicial foreclosure. *Id.* at *3. The Southern District of Texas granted summary judgment for the borrower in an action seeking a declaratory judgment that the four-year statute of limitations had run. *Id.* at *11.

Because dismissal of the earlier case did not automatically decelerate the note, the lender had to argue that it could unilaterally abandon acceleration. The court rejected this argument, relying on a long line of cases from Texas state courts holding that the lender and borrower must agree in word or action to an abandonment of the acceleration. *See, e.g.*, *Khan v. GBAK Properties, Inc.*, 371 S.W.3d 347, 353 (Tex. Civ. App. 2012) (stating that acceleration can be abandoned "by agreement or other action of the parties," such as when the borrower continues to make payments and the holder continues to accept them); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566-67 (Tex. 2001); *Debina v. City of Hurst*, 516 S.W.2d 460, 463 (Tex. Civ. App. 1974) (holding that a lender can abandon acceleration by *voluntarily* dismissing an action as long *as there is no*

objection); *Manes v. Bletsch*, 239 S.W. 307, 308 (Tex.App. 1922) (holding that a lender's attempt to abandon acceleration was not effective because the borrowers objected);); *San Antonio Real-Estate Building & Loan Assoc. v. Stewart*, 61 S.W. 386, 388-89 (Tex. 1901). Requiring both parties to agree to decelerate a note is inconsistent with automatic deceleration upon dismissal of a foreclosure.[4]

h. Nevada

In Nevada, as in New York and Texas, a lender seeking to decelerate a debt must do so with a clear and unequivocal act. In *Cadle Co II Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009), the Supreme Court of Nevada ruled that a lender's voluntary dismissal of a foreclosure action does not decelerate the related note for statute of limitations purposes. The lender in that case argued that its predecessor in interest had decelerated the debt by voluntarily withdrawing its suit. *Id*. The Nevada Supreme Court squarely rejected this argument, reasoning that "[b]ecause

[4] In the last two years, a few judges in Texas federal courts have broken from this line of precedent and held that lenders can unilaterally abandon acceleration in certain cases. Two of these cases have still required that the lender unequivocally communicate that the acceleration had been abandoned. *See Clawson v. GMAC Mortgage, LLC*, No. 3:12-CV-00212, 2013 WL 1948128 at *3 (S.D. Texas, May 9, 2013) (holding that lender unilaterally abandoned acceleration when it filed a notice of rescission); *DTND Sierra Investments LLC v. Bank of New York Mellon Trust Co.*, 958 F. Supp. 2d 738, 750 (W.D. Tex. 2013) (same). The one that did not relied only on these other mistaken opinions and a misunderstanding of *Holy Cross*. *See Leonard v. Ocwen Loan Servicing LLC*, No. CIV.A. H-13-3019, 2014 WL 4161769 at *5 (S.D. Texas, August 19, 2014).

an affirmative act is necessary to accelerate a mortgage, the same is needed to decelerate." *Id.* The dismissal did not, of its own accord, decelerate the mortgage "because it was not accompanied by a clear and unequivocal act [by the mortgagee] memorializing that deceleration." *Id.* Because the lender never successfully decelerated the debt, the second foreclosure action was found to be time-barred. *Id*.

i. New Mexico

New Mexico courts have explicitly distinguished between dismissals with and without prejudice in determining whether subsequent foreclosure actions are barred by the dismissal of an earlier case. A dismissal without prejudice will not bar a subsequent suit on res judicata grounds. For the same reason, that dismissal will not affect the running of the statutes of limitations. In *Smith v. Walcott*, 512 P.2d 679 (N.M. 1973), the New Mexico Supreme Court held that a trial court dismissal of an earlier suit *sua sponte* for lack of prosecution did not bar plaintiffs' later suit on admission of debt. The Court based its decision in significant part on the fact that the dismissal of the first suit did not meet the requirements of a state statute providing for the dismissal of cases, with prejudice, on the basis of non-prosecution. Hence, the Court reasoned, the case was not resolved on its merits under statute, and so res judicata did not apply.

The New Mexico Court of Appeals, in applying this holding, has also recognized its implication: the statute of limitations continues to run on a foreclosure action where it is dismissed without prejudice. Addressing a second mortgage foreclosure action where the first was dismissed for non-prosecution and the plaintiff's motion for reinstatement was denied, the Court of Appeals held that a failure to reinstate was not an a dismissal with prejudice, and so *Smith* applied. The court explained, "dismissal without prejudice under [the relevant rule of civil procedure] simply left the action as though it was never filed . . . . Nothing, including a failure to appeal, prevented Plaintiff from filing a second action, *although the second action was subject to any applicable statute of limitations*." *Bankers Trust Co. of California, N.S. v. Baca*, 151 P.3d 88, 90 (N.M. Ct. App. 2006) (emphasis added). Thus, under New Mexico law, a dismissal without prejudice for non-prosecution leaves the cause of action intact and the statute of limitations running.

j. Arkansas

In a 1943 case, the Arkansas Supreme Court considered a case where an earlier foreclosure had been dismissed without prejudice, and held that, because the lender had unilaterally waived the acceleration, a later foreclosure was not barred by the statute of limitations. *See Mitchell v. Fed. Land Bank of St. Louis*, 174 S.W.2d 671 (Ark. 1943). The decision implies that the dismissal did not

automatically decelerate the debt, because the court would not have considered the lender's ability to waive acceleration if the dismissal by itself had this effect.

k. States that Reject *Singleton*: Ohio, Maine, and Kentucky

Other states go further, holding or suggesting that when a suit brought on an accelerated debt is either dismissed or decided for the borrower on the merits, that precludes any future foreclosure on the note. These states would have reached a different result in *Singleton*, discussed *supra*, by (1) applying res judicata to bar any future foreclosure premised on the initial default and acceleration, and (2) rejecting the claim that the resolution of the initial foreclosure automatically decelerated the note. While these cases address dismissals *with*, rather than *without*, prejudice, they hold that the acceleration of the note changes the relationship between borrower and lender, and that dismissal does not undo such a change. The decisions of these courts thus provide persuasive precedent for finding that the dismissal of a suit does not automatically entail deceleration of the note.

In *U.S. Bank Natl. Assn. v. Gullotta*, 899 N.E.2d 987, 988 (Ohio 2008), the Supreme Court of Ohio considered the interaction of acceleration and res judicata in the context of Ohio's two-dismissal rule, which provides that two voluntary dismissals of the same case act as an adjudication upon the merits. In holding that U.S. Bank's third foreclosure suit against Gullotta was barred on res judicata grounds, the court rejected the lower court's opinion that the two dismissals under

Rule 41(A) effectively decelerated the note. *Id.* at 990. It instead held that the dismissal did not alter the original acceleration of the note, and that therefore subsequent actions were based on the same underlying claim, and so barred by res judicata. *Id.* It noted that under the two-dismissal rule, the second voluntary dismissal acts as an adjudication of the merits, akin to a dismissal with prejudice, "regardless of any contrary language in the second notice stating that the dismissal is meant to be without prejudice." *Id.* at 991 (internal citations omitted).

The Maine Supreme Court similarly has held that where a note is accelerated and a foreclosure suit brought on the basis of that note is dismissed *with* prejudice, res judicata bars any further suit on that note. In *Johnson v. Samson Const. Corp.*, 704 A.2d 866 (Me. 1997), a previous suit seeking judgment for the entire amount of the note had been dismissed with prejudice for a failure to file a conference report. *Id.* at 868. Johnson then attempted to initiate a second action on the entirety of the note. The court held this second suit was barred by res judicata with respect to both the pre- and post-judgment default. "Once [plaintiff] triggered the acceleration clause of the note and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Id.* at 869. The dismissal of the earlier suit did *not* reverse the acceleration of the debt. In so holding, the court noted: "Johnson cannot avoid the consequences of his procedural default in this second lawsuit by

attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit." *Id.* Dismissal, even with prejudice, could not undo the *contractually* defined acceleration of the debt.

The Kentucky Supreme Court has stated in dicta that it did not find the reasoning of *Singleton* persuasive, and that the acceleration of a mortgage note precludes cases brought on non-payment after the first dismissal. In *Hamlin v. Peckler*, No. 2005-SC-000166-MR, 2005 WL 3500784 (Ky. Dec. 22, 2005), the original trial court dismissed the first suit after the plaintiff failed to comply with discovery requests. The plaintiff attempted to bring a second foreclosure suit against the same defendant five years later. The second suit was based on the same acceleration as the first suit, in addition to a subsequent default on the debt. *Id.* at *1. The Kentucky Supreme Court characterized the question presented by this suit identically to that addressed by *Singleton*: "whether there can be subsequent defaults after suit is brought on an accelerated debt." *Id.* at *2. After holding that the involuntary dismissal of the first suit was with prejudice, the Kentucky Supreme Court went on to suggest that if it reached the merits of the second suit, it would be precluded by res judicata. *Id*.

II. THE ONLY TWO STATES THAT PROVIDE FOR AUTOMATIC DECELERATION OF THE NOTE ON DISMISSAL OF A FORECLOSURE ACTION WITHOUT PREJUDICE ARE DISTINGUISHABLE.

While the majority of states that have confronted the issue before the Court have found that a dismissal without prejudice does not alter either the acceleration of the debt *or* the statute of limitations, there are exceptions. However, the cases from these two states are distinguishable on a variety of grounds.

a. California

California is the only state to have definitively held that the dismissal of a suit for foreclosure has the effect of revoking a prior acceleration. This holding, however, is not persuasive precedent for at least three reasons: (1) it can be distinguished from the issue before this Court; (2) California courts have not invoked or otherwise examined the rule since 1935; and (3) the rule itself was based on a flawed reading of the California Supreme Court's own nineteenth century caselaw, suggesting that the court today would be less willing to affirm it if presented with the issue today.

In the most recent decision, *Edwards v. Mortgage Sec., Inc, of Santa Barbara*, 44 P.2d 1056, 1058 (Cal. Ct. App. 1935), the California Court of Appeal applied, to a case addressing the relationship between principal and surety, the "principle" that where a note includes an acceleration clause, the dismissal of a foreclosure suit functions as a "waiver." The effect of such a waiver, as the result of a dismissal, is "to restore the original contract to its full force and effect." *Id.* California courts had articulated this rule twice prior to the holding in *Edwards*.

See Keeler v. Baird, 191 P. 563, 564 (Cal. Ct. App. 1920); *Moore v. Russell*, 65 P. 624, 625 (Cal. 1901).

The *Moore*, *Keeler*, and *Edwards* cases all rely on an 1899 case, *California Sav. & Loan Soc. v. Culver*, 59 P. 292 (Cal. 1899). A close reading of these cases, however, reveals that the California appellate courts misapplied the California Supreme Court's holding in *Culver*. The facts in *Culver* were as follows: the relevant note was issued in 1891 and would have matured in 1894; a suit for foreclosure was brought in 1892 and judgment entered, but reopened and vacated after mortgagor demonstrated he was not in default; the mortgagor began paying on the note again; and the mortgagee initiated a second suit to recover what was remaining on the debt in 1896. *Id.* at 293. The mortgagor argued that the statute of limitations had run from the mortgagee's exercise of the note's acceleration clause in 1892, and therefore precluded recovery in the 1896 suit. *Id.*

The court rejected this argument. Instead, it held that this case was analogous to one in which a "plaintiff had commenced the first action when no interest was really due; in such a case, "no one would claim that the provisions of the note had been in any way changed," so the statute of limitations would continue to run from the maturity date of the note, rather than the date of mistaken acceleration. *Id.* at 294. The court reasoned that "the same result follows" in this case, because the first suit was dismissed on the grounds that defendant had

successfully demonstrated that no default had existed. *Id.* Because he pled in the initial suit that no default existed, the mortgagor could not then rely on the acceleration (which depended on the existence of that default) in claiming the statute of limitations had run; the mortgagor was "estopped" from invoking the statute of limitations. *Id.*

In the subsequent cases, however, the courts did not rely, as the *Culver* court had, on the nature of the dismissal of the first suit; nor did they mention the *Culver* court's estoppel reasoning. Instead, the courts treated the dismissal of the original suit as a per se waiver of the acceleration clause. The court's holding in *Culver* rested on the fact the original acceleration was in error; or at least that the mortgagor, having defeated foreclosure by arguing that he never defaulted, could not then invoke the consequences of that default to argue the statute of limitations ran on a subsequent default and suit.

The rulings in *Moore*, *Edwards*, and *Keeler* therefore rest on a misreading of the reasoning of *Culver*. *Culver*, like *Singleton*, relied on the nature of the resolution of the initial foreclosure suit and is therefore distinguishable from *Bartram*, where the first foreclosure was dismissed without a substantive holding by the court. The issue now before the court is whether a dismissal without prejudice that does not address whether the mortgagor has defaulted resets the statute of limitations. In *Culver*, in contrast, the first suit was resolved by a

determination that the initial acceleration had been in error; it presents an issue of res judicata and is therefore akin to *Singleton*.

b. Indiana

In Indiana, rules surrounding deceleration for statute of limitations purposes remain unsettled. The Supreme Court of Indiana has held that in the narrow context of claim preclusion under res judicata, lenders are not barred from bringing subsequent foreclosure claims. *Afolabi v. Atlantic Mortg. & Investment Corp.*, 849 N.E.2d 1170 (Ind. 2006). This holding drew heavily from two cases: *Singleton* and *Booher v. Richmond Square*, 310 N.E.2d 89 (Ind. Ct. App. 1974). *Booher* held that res judicata did not bar subsequent suits for rent payments when tenants miss additional payments after dismissal of the initial suit. Suits over rent payments, of course, involve neither acceleration nor deceleration.

The court in *Afolabi* concluded that "in light of *Booher* and *Singleton* . . . *the claim preclusion part of the doctrine of res judicata* does not bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim." *Afolabi*, 849 N.E.2d at 1175 (emphasis added). The decision did not explicitly consider the circumstances under which deceleration is effective. *Id.* Because the second foreclosure action fell within Indiana's ten-year statute of limitations, the court did not consider whether the lender's claim was time-barred. *Id.* The *Afolabi* decision gives no guidance on

when dismissals lead to deceleration, does not consider the statute of limitations, and is based partially on a misapplication of landlord-tenant law. The case therefore provides little direction for this Court in resolving the issue before it.

III. NEXT STEPS

The large majority of states hold that a dismissal of a foreclosure action without prejudice does not automatically decelerate the note. The two that do not so hold either misread their own precedents (California) or have not considered the question in the statute of limitations context (Indiana). We urge the Court to refrain from making Florida an outlier in this respect.

A ruling for the borrower in this appeal would have little effect on lenders in general. The fact that courts in only fifteen states have issued decisions on this topic means, of course, that courts in thirty-five states have not. For decades, lenders all around the country have found a way to file and prosecute their foreclosure actions in time. We urge the Court to refrain from making law that would excessively impair the rights of borrowers, create further uncertainty in the market, and burden the court system with decades of litigation.

IV. CONCLUSION

For the forgoing reasons, we urge the Court to reinstate the summary judgment of the Seventh Judicial Circuit Court consistent with Florida law in an effort to foster stabilization of and certainty in the Florida housing market.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this brief was prepared in compliance with Rule 9.210(a)(2) of Florida Rules of Appellate Procedure.

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