In the Supreme Court of Florida

CASE NO. SC14-1265
(Consolidated with Case Nos. SC14-1266 and SC14-1305)
Lower Tribunal Case No.: 5D12-3823

Lewis Bartram, Patricia Bartram & Plantation at Ponte Vedra, Inc.

Petitioners,

v.

U.S. Bank, N.A.,

Respondent.

On Appeal from the Fifth District Court of Appeal

Amicus Curiæ Brief in Support of Respondent U.S. Bank, N.A. Submitted by the American Legal and Financial Network ("ALFN")

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SUMMARY OF ARGUMENT

In the underlying action, Petitioner Lewis Bartram sought to remove a mortgage lien in order to quiet title to real property. The expiration of a mortgage lien is governed by the statute of repose. The question certified involves the statute of limitations. Accordingly, this Court need not answer the certified question to affirm the Fifth DCA, but we encourage the Court to do so in light of the Third DCA's recent decision in Deutsche Bank Trust Company v. Beauvais, Case No.: 3D14-575 (Fla. 3d DCA 2014). Should the Court answer the question, it should do so in the negative, whether framed as is or rephrased as suggested. Singleton is on point. The lynchpin of both the *res judicata* and the statute of limitations analysis is the same: whether a demand for acceleration puts the entire balance, including future installments, at issue. The answer is "no," provided Singleton remains good law. Even so, there are at least four other reasons to affirm the Fifth DCA.

First, the demand for acceleration is distinct from its award. Only when the demand is *effective* does acceleration take place. It is effective only when it results in a judgment granting acceleration in a complaint (or the borrower repays the loan). Otherwise, a demand for acceleration (*i.e.*, a declaration that "all amounts are due and payable") is nothing but an allegation. It dissipates upon dismissal.

Second, the primary purpose of the statute of limitations is to protect defendants from unfair surprise and stale claims. No reasonable borrower can be

"unfairly surprised" that his or her lender expects to be repaid; and the legislature has effectively found that an action to foreclose for breach of a promissory note is not "stale" if brought within five years from the date of the breach triggering the action. Recovery for prior breaches is time-barred, to the benefit of the borrower.

Third, safeguarding mortgage contracts and the enforcement thereof is a matter of constitutional significance. Moreover, both state and national policy coalesce to protect the financial stability of mortgage lenders and the secondary mortgage market, as the shortage of money does not benefit Florida or its residents.

Fourth, an answer in the affirmative invites economic collapse.

STANDARD OF REVIEW

The standard of review is *de novo*. See Raymond James Fin. Servs., Inc. v. Phillips, 126 So. 3d 186, 190 (Fla. 2013).

ARGUMENT

I. Three Options for the Court

One option is to affirm without answering the certified question.[1] The underlying decision arises from an action to quiet title due to an alleged expiration of the statute of limitations on an action to foreclose a mortgage for non-payment of principal and interest on a promissory note. However, the question certified makes

[1] See e.g., Anderson v. Gannett, 994 So. 2d 1048 (Fla. 2008) (declining to answer certified question, but affirming on other grounds); S. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317 (Fla. 2005) (declining to answer certified question).

no reference to Florida's quiet title statute, Fla. Stat. § 65.061; and, even so, the expiration of a mortgage lien is not governed by the quiet title statute, but by Florida's statute of repose, Fla. Stat. § 95.281.

This is significant because non-payment of principal and/or interest is not the only form of breach inviting foreclosure.[2] Thus, even assuming the statute of limitations to foreclose for non-payment of principal and interest had expired in this case, (which we do not), Mr. Bartram could not quiet title because U.S. Bank's lien would survive expiration of the statute of limitations until extinguished by the statute of repose. Foreclosure on other grounds would remain an option in the interim, just as the Florida legislature evidently devised.[3]

A second option is to rephrase the question, and then answer it as rephrased.[4] Respectfully, the way in which the Fifth DCA phrased the certified question renders

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[2] See e.g., Lunn Woods v. Lowery, 577 So. 2d 705 (Fla. 2d DCA 1991)(reversible error to deny foreclosure where mortgagor failed to pay real estate taxes and assessment).

[3] See Houck Corp. v. New River, Ltd., 900 So. 2d 601, 603 (Fla. 2d DCA 2005) ("The limitations period provided in section 95.11(2)(c) does not affect the life of the lien or extinguish the debt; it merely precludes an action to collect the debt after five years. Section 95.281(1)(b), conversely, establishes an ultimate date when the lien terminates and is no longer enforceable.…Thus it is clear that section 95.11 (2)(c) operates as a statute of limitations while section 95.281(1)(b) operates as a statute of repose"). The Third DCA reached the same conclusion in Beauvais.

[4] See e.g., Warner v. City of Boca Raton, 887 So. 2d 1023 (Fla. 2004) (rephrasing certified question before answering).

its opinion subject to at least two interpretations. Both interpretations permit the mortgagee to re-accelerate. However, one interpretation of the opinion limits the amount of past-due payments the mortgagee can recover to those accruing since dismissal of the prior suit. A second interpretation permits the mortgagee to re-accelerate and recover for amounts due within the five years preceding the date on which the subsequent suit is filed. [5] For the sake of clarity, and should this Court answer the certified question, we respectfully submit that the Court rephrase the question as it deems appropriate or, otherwise, as follows:

> Does ***a demand for*** acceleration of payments ***allegedly*** due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee ***more than five years after the demand***?

A third option is to answer the question as certified. Either way, to defer answering the question may just serve to delay the inevitable, leaving the law in flux pending review of Beauvais. Thus, we respectfully seek an answer in the negative, and submit the Court should clarify that a mortgagee can re-accelerate and re-file an

[5] We accede to the second interpretation. Adopting the first interpretation would reward the mortgagee who waited six years to file its first action (allowing it to seek amounts accruing within the preceding five years), while punishing the mortgagee who promptly filed suit upon default, then promptly refiled a second suit upon dismissal of the first (precluding it from seeking anything more than what accrued in the interim, which could be a matter of just a few months' payments).

action seeking all amounts that accrued within five years preceding the filing of the new action and all amounts scheduled to become due thereafter.

II. Answering the Question: The *Singleton* Analysis

Respectfully, the Petitioners' efforts to distinguish the statute of limitations analysis in this case from the *res judicata* analysis in Singleton v. Greymar & Assoc.[6] have produced no more than distinctions without a difference. The central question to both analyses is whether a mere demand for acceleration puts the entire balance, including future installment payments, at issue. In Stadler v. Cherry Hill Developers, Inc.,[7] Florida's Second DCA answered the question decisively, and in the affirmative. Then came Singleton. Resolving a conflict between the Second DCA in Stadler and the Fourth DCA in Singleton, this Court sided with the Fourth DCA, holding that, "[w]hile it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue."[8]

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[6] 882 So. 2d 1004 (Fla. 2004).

[7] 150 So. 2d 468, 472 (Fla. 2d DCA 1963).

[8] Singleton, 882 So. 2d at 1007 (citations omitted).

In support, this Court cited Olympia Mortgage Corp. v. Pugh,[9] quoting it as follows: "[w]e disagree [with Stadler] that the election to accelerate placed future installments at issue."[10] Although Singleton dealt with the doctrine of *res judicata*, the lynchpin of the *res judicata* analysis and the statute of limitations analysis is the same: whether a mere demand for acceleration puts the entire balance, including future installments, at issue such that a subsequent action triggered by a new default under an installment contract is barred. As this Court held in Singleton, the answer is "no."[11] For that, and for the four other reasons discussed briefly below, the ALFN asks this Court to affirm the Fifth DCA and, if the Court answers the certified question, to answer it in the negative.

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[9] 774 So. 2d 863, 866 (Fla. 4th DCA 2000).

[10] 882 So. 2d at 1007.

[11] Space in this *amicus* brief does not permit an exhaustive analysis of Beauvais (which is not even final at the time of this writing). In addition to the arguments made herein, however, the undersigned submit that the Third DCA erred in Beauvais, largely by assuming the existence and validity of a Notice of Intent to Accelerate (or, "breach letter") that was not even made part of the record on appeal. ***A valid breach letter is a condition precedent to a valid demand for acceleration***. Because the first foreclosure action against Mr. Beauvais was dismissed "without prejudice," there was no adjudication as to the existence of a breach letter, let alone its validity. The Third DCA took this *lack of any determination* of invalidity to be a ***determination of validity***: a finding that the breach letter was necessarily extant and valid, and, therefore, that the demand was valid and "effective." See Beauvais, Case No.: D14-575, at pgs. 16-17.

III. Four More Reasons to Affirm the Fifth DCA

A. Mere demand for acceleration is distinct from its award.

The Petitioners ask this Court to equate the *demand* for acceleration with its *award*. However, the two are distinct, and the distinction is significant. A demand for acceleration is a condition precedent to an award of acceleration, and nothing can be a condition precedent to itself. Acceleration is a remedy. As Florida's Third District Court of Appeal has held, "only when the option [to accelerate] is exercised in an effective manner does acceleration take place."[12] Barring a voluntary payoff from the borrower, the option is exercised in an effective manner only when it results in a final judgment from the court. This Court should recognize and draw a bright line of demarcation between the mere demand for acceleration in a letter or complaint, and the award of acceleration in a judgment.

Demands for acceleration often prove ineffective, as would be the case if a mortgagee sent a deficient Notice of Intent to Accelerate, if a mortgagor disproved a plaintiff-mortgagee's allegation of non-payment, or if a putative mortgagee without standing made the demand. However, proving that the breach letter was deficient, that a payment was made when it was allegedly missed, or that a given plaintiff lacked standing at the time it filed suit, could not reasonably operate to

[12] Florida Zippo, Inc., v. Prudential, 579 So. 2d 192, 192 (Fla. 3d DCA 1991), citing David v. Sun Fed. Sav. and Loan Ass'n., 461 So. 2d 93 (Fla. 1984).

extinguish liability in a subsequent action for all amounts that are not even scheduled to become due until amortized through expiration of a loan's maturity date some ten, fifteen or twenty-plus years down the road.[13]

To the contrary, proof of the underlying default is a precondition to an award, or a judgment, accelerating amounts otherwise due and payable in the future and making them due and payable upon rendition of the judgment. Absent proof of an initial default, trial courts cannot even reach the issue of future defaults, let alone forgive them as Petitioners would have it.[14] Demanding acceleration is akin to suing for an anticipatory breach. Surely, defeating a claim for anticipatory breach would not relieve a defendant from future performance under a contract, even if the defendant "defeated" the claim by having it dismissed "without prejudice" for lack of prosecution.

Where there has been no default, no cause of action has arisen, and where no cause of action has arisen, no statute of limitations has begun to run. See Travis Co.

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[13] See Singleton, 882 So. 2d at 1007 ("For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default…In[that] instance[], the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations...[which]…should not bar a subsequent action [upon a later default]").

[14] See Poinciana Hotel. v. Kasden, 370 So. 2d 399, 400 (Fla. 3d DCA 1979)("The crucial element in any mortgage foreclosure proceeding to accelerate sums due under a note and underlying mortgage is an actual default") (citations omitted).

v. Mayes, 36 So. 2d 264 (Fla. 1948)("[t]he law is well settled that the Statute of Limitations begins to run against a mortgage at the time the right to foreclose accrues" (citations omitted)).[15] Nonetheless, the Petitioners seek to eat their cake and still have it too, arguing that a mortgagee's decision to file suit for a cause of action it does not ultimately prove, for whatever reason, (a) warrants dismissal of that suit (for failure to prove that a cause of action arose); ***but*** (b) still starts the statute of limitations running for purposes of barring a second suit on the first cause of action alleged (but not proved) ***and*** *on all causes of action that arose, and can arise, thereafter*, including the mortgagor's failure to pay taxes and insurance.

In effect, their defense to the second suit would have to be that the mortgagee could or should have prevailed in the first suit—a *res judicata* argument at its core. This is essentially the argument Petitioner Lewis Bartram sets up on page 6 of his Initial Brief. Therein, he submits that, under the terms of the Note and Mortgage, "the entirety of [his] debt . . . became due in 2006" because U.S. Bank filed suit in

[15] See also, City of Riviera Beach v. Reed, 987 So. 2d 168, 170 (Fla. 4th DCA 2008) (a cause of action does not accrue, nor does the statute of limitations begins to run, until an action can rightly be brought); Woodall v. Travelers Indem. Co., 699 So. 2d 1361 (Fla. 1997), Justice Anstead (concurring opinion) ("A statute of limitations on a contract action does not begin to run until an action can be brought on the contract, and no action can be brought on a contract until all conditions precedent to recovery on the contract have occurred. Therefore, the statute of limitations on a contract action does not begin to run until all conditions precedent to recovery under the contract have occurred (citations omitted)."

2006 declaring the full amount to be due, and because he did not dispute it. This just begs the question, if he owed the money and was tired of the litigation, *then why didn't he pay the debt or vacate possession of the security*? Either would have spared him the tiresome litigation for which he and the other the Petitioners fault "the banks." This is the elephant in the room the Petitioners do not want to address because it eviscerates their arguments in "equity."

Nonetheless, and despite whether Mr. Bartram disputed the allegations against him in the foreclosure action, there was *no adjudication* with respect to anything in that case, including acceleration. Nor is acceleration self-effectuating on demand. To the contrary, paragraph 19 of the Mortgage gave Mr. Bartram the right to reinstate at any time up until judgment was entered by paying all amounts due *up to the date on which payment is made*, irrespective of anything scheduled to become due in the future. Had he reinstated by tendering payment of amounts *then due*, the trial court would immediately have lost its ability to award acceleration. Therefore, there were always "new" or future payments due. Cf. Beauvais.

Accordingly, and throughout the entire course of U.S. Bank's foreclosure litigation, *future payments remained to be paid in the future*. They were not rendered past-due merely by virtue of U.S. Bank's demand for them. If a demand for acceleration renders future payments due prior to judgment, then courts should be including in their judgments interest on those amounts from the date of the demand

(*i.e.*, mortgagees would get interest from the date of the demand on amounts not even due as of the date of demand). The fact that the mortgagee could or should have prevailed in the first suit but did not (due to its failure to establish a cause of action or its election to dismiss) should not preclude the mortgagee from re-filing as acknowledged by this Court in Singleton and by the Fourth DCA in Olympia Mortgage,[16] particularly where the mortgagee is relying on a new or different breach occurring within the five years preceding filing of the new suit.

The Courts' reasoning in those decisions is sound. If a mortgagee sends a borrower a notice of intent to accelerate *when the borrower is not even in default*, the notice has no legal significance. The notice has legal significance to an ensuing demand for acceleration only if the mortgagee proves the default that results in a judgment awarding acceleration. By the same token, if a case is dismissed, for whatever reason, there is no judicial determination of default and the notice of intent to accelerate, again, has no legal significance. Neither does the demand for acceleration. The fact that the plaintiff has yet to prove the borrower owes anything *now* does not establish that the borrower owes nothing *ever*.

[16] In Singleton, this Court noted that "[c]learly, justice would not be served" if a prior adjudication could prevent a subsequent suit based on a subsequent default. Singleton, 882 So. 2d at 1007-1008. How much more would justice be disserved if a prior dismissal *without adjudication* could prevent a subsequent suit based on subsequent defaults? And what clearer way is there to decelerate than to withdraw or suffer dismissal of the entire complaint? Whether the dismissal was with or without prejudice should make no difference. Cf. Beauvais.

Dismissal short of foreclosure acts to decelerate the demand because the attempt to accelerate failed or was withdrawn. It does not conclude that no future amounts could ever be due. Likewise, a judgment awarding foreclosure for amounts past-due but denying acceleration on equitable or other grounds does not relieve the borrower from having to make future payments.[17] Otherwise, a mere demand for acceleration by a party, with or without standing, and regardless of whether there has been a default, can forever preclude anybody from asserting any other default so long as the mortgagors and their counsel can get a dismissal, on any ground, more than five years after the initial default is first alleged. This would amount to wholesale *dismissals* of causes of action that have yet to accrue.

B. Legislative intent warrants the Fifth DCA's conclusion.

Generally speaking, the purpose of the statute of limitations is to protect defendants from "unfair surprise and stale claims," in large part because records get lost and memories fade.[18] No reasonable borrower should be unfairly surprised that a lender expects to be repaid, particularly where the lender has been endeavoring to get repaid for five years or more from the initial default. Moreover, by establishing a five-year statute of limitations in which to foreclose, the Florida legislature has

[17] See e.g., Delgado v. Strong. 360 So. 2d 73 (Fla. 1978) (court of equity may refuse acceleration where it would be unconscionable and unjust).

[18] See Raymond James, 126 So. 3d at 191.

determined that claims for amounts due under a note secured by a mortgage are not stale if brought within five years of the date on which they are due. To construe the statute as the Petitioners would have it, this Court would be deeming "stale" claims for monies that, but for *a mere demand* for acceleration, would not yet even be due as of the date of dismissal. Records and memories related to amounts not yet due have yet to be generated and therefore cannot yet be lost or forgotten. Such a construction would be facially absurd, and therefore presumptively inconsistent with legislative intent.

Moreover, statutes of limitation are in derogation of the common law and are strictly construed against application.[19] If the Florida legislature had intended the law to apply as Petitioners would have it, the Florida legislature could (and, presumably, would) have provided so expressly, as other state legislatures have done. In New York, for example, if a mortgage foreclosure action is not brought within the six-year statute of limitations, a mortgagor or any other person having an interest in the mortgaged real property can commence an action pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") § 1501(4),[20] seeking

[19] Major League Baseball v. Morsani, 790 So. 2d 1071, 1077-1078 (Fla. 2001); Baskerville-Donovan Eng's v. Pensacola House, 581 So. 2d 1301, 1303 (Fla 1991).

[20] RPAPL 1501(4) (McKinney 2014) provides that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired," any person with an estate or interest in the property may maintain an action "to secure the cancellation and discharge of record of such

an order declaring that the mortgage is invalid, and directing that it be cancelled and discharged of record. See JBR Construction Corp. v. Staples, 71 A.D. 3d 952, 953, 897 N.Y.S.2d 223, 224 (App. Div. 2010). If the mortgagor moves to dismiss the foreclosure complaint as time-barred, he or she can also seek an order to that same effect. RPAPL § 1501(4). The Florida legislature has passed no such law, and this Court should not create one by judicial fiat.

C. Public policy warrants the Fifth DCA's conclusion.

We recognize that matters of public policy, including those affecting statutes of limitation, are first and foremost matters of legislative prerogative.[21] We submit that, except for the Third DCA in Beauvais, every federal trial and state appellate court in Florida to address the issue to date has applied the statute in a manner consistent with Florida legislative policy. This Court has underscored the fact that "[s]afeguarding the validity of [mortgage] contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions." David v. Sun Federal Sav. & Loan Ass'n, 461 So. 2d 93 (Fla. 1984). Moreover, this Court has acknowledged a "national policy to protect the financial stability of mortgage lenders and the secondary mortgage market," concluding that

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encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom…"

[21] See Am. Lib. Ins. Co. v. West and Conyers, 491 So. 2d 573 (Fla. 2d DCA 1986).

the "shortage of mortgage money benefits neither buyers and sellers of Florida real estate nor the Florida economy as a whole." Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985). Where, as here, national and state public policy so clearly coalesce, they should inform this Court's decision-making process as it considers the ramifications of its answer to the question before it.

At its core, a home loan is a simple concept. Borrower says to lender, "loan me the money to buy this house and I'll pay you back with interest. If I can't pay you back, you can sell the house and apply the proceeds to my debt." To apply Florida's statute of limitations the way the Petitioners would have it would rot the core, and to rot the core would be to spoil the fruit for those borrowers and lenders willing and able to honor the simple concept by which both presently benefit. Worse yet, it would undermine the sanctity of contract, depriving lenders of the benefit of their bargains, *ex post facto*, because it would, in effect, change the law on which they relied when entering into a contract to loan money.

Statutes of limitation are procedural and, because they are procedural, "their expiration does not affect the underlying substantive rights of the parties involved." Allie v. Ionata, 503 So. 2d 1237, 1241-1242 (Fla. 1987). The most fundamental, substantive right that Mr. Bartram granted to U.S. Bank, as mortgagee, is the right to foreclose in the event of a material breach. The essence of that right is "to subject the mortgaged property to the payment of the debt." Georgia Cas. Co. v. O'Donnell,

147 So. 267, 268 (Fla. 1933). What the Petitioners urge is an interpretation and application of a procedural law in a way that would effectuate an *ex post facto* change in substantive law to the benefit of those who, after the fact, have evidently changed their minds about pledging their collateral as security. Even in times of great financial crisis, this Court has recognized that:

> Contracts of this character are made in anticipation of the fact that conditions may change and that the time may come when the mortgagee can only look to his security pledged in the mortgage for the payment of his debt, and also that that security may have so depreciated in value as to be insufficient to bring the amount of his debt. The mortgagor enters into the contract, not only agreeing to pay the debt, but further agreeing as an evidence of his good faith and intention to pay the debt that, if the debt is not paid at maturity, the mortgagee shall have the right to enforce his pledge and to have the property described in the mortgage sold to pay the debt, or so much thereof as the pledged property will produce.[22]

Foreclosure sounds in equity, and equity abhors a forfeiture.[23] Construing the statute to facilitate a forfeiture as the Petitioners would have it would result in a windfall to delinquent borrowers and their counsel at the expense of lenders, mortgagees, and performing borrowers, both current and prospective. However, a borrower's *inability* to repay a debt (albeit sometimes for sympathetic and understandable reasons), coupled with the *ability* of his or her counsel to roadblock

[22] Morris v. Waite, 119 Fla. 3, 160 So. 516, 518 (Fla. 1935).

[23] Metro. Dade Cty. v. Potamkin Chev., 832 So. 2d 815, 818 (Fla. 3d DCA 2002).

foreclosure for five years and then get the case dismissed, with *or without* prejudice, should not result in a "free" house.[24] It is not as if borrowers lack the contractual right to reinstate prior to judgment being entered and the statutory right to redeem right up to the point of sale, in addition to the option of resorting, as some do, to serial bankruptcy filings to invoke the automatic stay of the federal bankruptcy code while they live in the house "rent free." "Equity" should not cap all that with a judicially mandated forgiveness of the debt after five years of protracted litigation that ends with the borrower paying nothing.

A more equitable outcome, and one in keeping with legislative purpose and intent, would be to apply the law as most Florida state appellate and federal courts have done to date, barring mortgagees from seeking amounts accruing more than five years before a given complaint is filed, but not from seeking amounts due within that five years and accruing thereafter. This would protect borrowers from "stale" claims, as the legislature has effectively defined the term, entitling them to retain monies more than five years past-due; and it would encourage timely and diligent

[24] See FHLMC v. Taylor, 318 So. 2d 203, 207 (Fla 1st DCA 1975) ("The obligation of a mortgagor to pay and the right of a mortgagee to foreclosure in accordance with the terms of the note and mortgage are absolute and are not contingent on the mortgagor's health, good fortune, ill fortune, or other personal circumstances affecting his ability to pay" (citation omitted)). Also, any suggestion that delay is primarily occasioned by the banks as opposed to inundation of the court system and, often, dilatory tactics of defense counsel is wholly without basis in the record and, to say the least, counterintuitive.

prosecution by mortgagees without chilling their ability to engage in loss mitigation efforts during the process and without making a "nullity" of the statute of limitations, as some have suggested. To the contrary, it is the statute of repose that stands to be nullified should Petitioners prevail in this case.

D. Economic concerns warrant the Fifth DCA's conclusion.

The potential adverse economic impact of an affirmative response to the certified question can hardly be overstated, and it would likely begin in the judiciary. The straits were dire when the foreclosure crisis began. See The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding, prepared for the Florida Bar by The Washington Economics Group, Inc. (Feb. 9, 2009). We submit they have multiplied since. As it stands, many trial courts are wont to clear their calendars of foreclosure cases by dismissal on numerous, often "discretionary," grounds (*e.g.*, failure to appear at scheduled events, failure to amend within court-established time-frames, failure to comply with discovery obligations, etc.). Technically, such dismissals require Kozel[25] hearings, and Kozel hearings that result in dismissals invite appeals.

Practically, however, it is less expensive and less time-consuming for mortgagees to forego the Kozel hearing and appeals process and simply re-file as they regularly do (albeit often advancing the breach date to avoid dismissal on *res*

[25] See Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993).

judicata grounds). This saves the judiciary the time and expense of Kozel hearings and appeals as well. However, were this Court to rule that a dismissal putatively "without prejudice" is effectively *with prejudice* due to the expiration of the statute of limitations, lender-plaintiffs would have no choice but to insist on evidentiary Kozel hearings and appeals to avoid losing not just one month's payment, but all payments due (past and future) through maturation of the loan. This would further clog the judiciary at the trial court and appellate levels at the expense of judges and litigants alike, even those whose cases have nothing to do with foreclosure.

And this would be just the beginning. Common sense suggests that an *ex post facto* change to the law extant and as applied to date would have a chilling effect, discouraging lenders from lending except on terms beyond the ability of many a would-be borrower to meet, and reducing the amount of mortgage-backed securities in which investors will invest. Meanwhile, property values would likely decline as neighborhoods populated by home-owners who pay their bills are pockmarked by home-owners who do not, but obtained their property, ironically, by default. The latter would be in a position to undermine the market by offering their properties for sale at a price below what their neighbors could accept for sale of their comparable properties. The Second DCA has previously considered what would be, in effect, a mass moratorium on mortgage foreclosures:

> It would tend to greatly limit, if not entirely destroy, all dealings based upon contract. No one would feel safe in loaning money upon the

> solemn obligation of the borrower to repay it in accordance with the terms of the loan; and the enforcement of this doctrine, claimed to be equitable, would return to the people as a plague, demoralizing all industrial and economic transactions based upon obligations to perform and result in untold hardships and deprivations to the great mass of individuals (citation omitted).[26]

The adverse economic impact would extend beyond residential mortgages into every installment contract containing an acceleration clause throughout the state. The potentially adverse effect on borrowers, lenders, taxpayers, businesses, investors and the mortgage-servicing industry as a whole is virtually beyond measure. As suggested above, the straits were dire in 2009. Those woes were hardly ameliorated by the ensuing avalanche of mortgage loan defaults. Whether those state and national woes accelerate or decelerate from this point forward lies largely in this Court's hands. A ruling for the Petitioners—an answer in the affirmative—could multiply those woes exponentially.

CONCLUSION

This Court should answer the certified question in the negative, and clarify that mortgagees can both accelerate and sue for amounts due within the five years preceding the filing of a complaint to foreclose even if a prior action to foreclose was dismissed, and regardless of whether it was dismissed with or without prejudice.

[26] Lee Cty. Bank v. Christian Mut. Found., Inc., 403 So. 2d 446, 449 (Fla. 2d DCA 1981)(citations omitted).

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