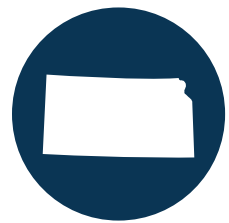


Statute of Limitations Considerations Post-Covid

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With the end of the moratorium and influx of proceed instructions regarding foreclosures that have been on hold for prolonged periods of time, it seems

prudent to review recent developments in Kansas regarding the relevant statute of limitations.

In Kansas, foreclosure actions are subject to a five-year statute of limitations. However, the case law in Kansas is quite clear that where the loan documents provide the lender the right to accelerate the debt at the lender's discretion, then the statute of limitations is not actually triggered until the debt is accelerated. Absent unusual circumstances, the debt is not considered accelerated until a lawsuit is filed to enforce the debt. See *Wilmington Sav. Fund Soc'y v. Holverson*, 2021 Kan. App. LEXIS 20 (Ct. App. May 14, 2021).

Waiver of the statute of limitations came up in *First Sec. Bank v. Buehne*, 471 P.3d 730 (Kan. Ct. App. 2020). Buehne was a commercial real estate case but raised some interesting issues regarding a clause in the loan documents that provided a waiver by the borrowers of any application of the statute of limitations to the extent permitted by law. In upholding this waiver and allowing the foreclosure to proceed, the Court of Appeals focused on the long line of cases that uphold the principle that: "the paramount public policy is that freedom to

contract is not to be interfered with lightly." Using that foundation, the Court held that such a waiver does not violate public policy and is valid.

While the typical security instrument in Kansas is unlikely to include a waiver of the statute of limitations clause, this may be a consideration for servicers, lenders or investors as they review loans for potential modification or other loss mitigation. This was a consideration of Court as well:

Rather, the waiver provision grants the Bank the option to delay filing a lawsuit after a default has been declared instead of rushing to the courthouse to file a foreclosure action. Such a provision could potentially benefit debtors by giving them additional time to work out a compromise or settlement with a lender.

Id. at 17-8.

Finally, in *Deutsche Bank Nat'l Tr. Co. v. Hinds*, 475 P.3d 1294 (Kan. Ct. App. 2020), in what could be considered a unique situation, the statute of limitations related to the correction of a partial release of mortgage (also five years) was estopped after the borrowers recognized the error prior to the expiration of the statute of limitations and kept it to themselves. This created a situation wherein the borrowers "lulled the lender into a false sense of security" such that the lender could not timely redress the issue as a reasonably lender/servicer would. In other words, by

not bringing the issue to their loan servicer's attention, the borrowers were unable to rely on the statute of limitations to argue their loan had been fully released.

Also noted in this case, and potentially of more use, a Hardship Affidavit was used to argue that the "Hindses' acknowledgment of the mortgage in the Hardship Affidavit 'was distinct, unequivocal, and without qualification'" sufficient to toll the statute of limitations under Kansas case law. The District Court agreed with this argument. The Hindses did not contest or brief this issue, so it was considered abandoned by the Court of Appeals, but the Court went out of its way to say that the reformation claim was not barred using this alternative argument as well.

Reason suggests that statute of limitations issues will be a frequent argument in the industry over the next several years and the cases cited can provide a strategy to counter those arguments or even head them off all together.

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