FORECLOSURES AND STATUTES OF LIMITATIONS

By W. Christopher Barrier

Arkansas lenders have, in the last few years, learned more about the law related to foreclosure than they really wanted to. We have in fact visited most of the critical issues in past e-briefs. However, many lenders remain confused on several issues, particularly with regard to statutes of limitations and their impact on commonly used mortgage forms.

In particular, does a mortgage lien evaporate five years after its recording if the mortgage states no maturity date? What if the mortgage has a maturity date but the underlying debt secured by it has been extended for more than five years with no extension on the record?

The five-year period merely references the statute of limitations on underlying notes (although (d)(1) and (2) reference it specifically as to vendor's liens). What Ark. Code Ann. §18-49-101(a) says is that if a note is barred by limitations, so is the mortgage, no surprise there.

The section goes on to say at subsection (b) that, in either category, extending the statute as to the note, typically by periodic payments having been made, without that being memorialized on the record, does not preserve the lien as to third parties, such as junior mortgagees or judgment lien holders. If there are no third party liens, the mortgage may still be foreclosed without priorities problems.

Recording a payment record before the statute runs preserves the priority over those lien claimants, for five years from the date of that last payment, not from the filing.

What if the statute runs on the mortgage, liens intervene, then a properly drawn extension document is recorded, followed by more liens?

The filing for that extension document does not relate back, but it is effective prospectively. Those first filings (in what is sometimes called the "dead period") trump the mortgage, but the later ones do not.

The importance of the record is reinforced by Ark. Code Ann. § 18-40-103, which is very similar to Ark. Code Ann. §18-49-101---but not identical. Specifically, the former statute requires "a written agreement setting forth the terms of the extension or renewal and the description of the property affected…" to be acknowledged and recorded.

The latter does not mention extension agreements, or legal descriptions but simply calls for the recordation of the payment record.

The latter procedure can be used by the lender alone if the debtor for some reason cannot or will not sign an extension agreement, but the literal wording of the statute requires a payment – by-payment record, not just a present balance. A legal description is not mentioned.

The former statute requires the "terms of the extension or renewal" and, as noted, a legal description, so mortgagees have to remember which tool they are using. (Arguably, referencing the recording information gives a "description of the property affected", but why take a chance?)

In dealing with these and similar problems, forms can be a lender's friend or enemy. A properly drawn "dragnet clause" in a mortgage can pick up other debts of the borrower who has mortgaged more than one property, even if there has been a statute of limitations glitch as to one of them.

Conversely, using a form which recites a limitation on amounts to be secured by the mortgage (usually the note amount) can deprive the lender of the benefits of cross-collateralization, among other dangers.

In all of the instances noted, there are actions which can and should be taken promptly to contain possible damage when problems surface, but the challenge will always be to anticipate rather than simply reacting.

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