MRLP
McCalla Raymer Leibert Pierce, LLC

777 108th Ave NE
Bellevue WA, 98004
T. (425)-241-5459
www.mccalla.com
Office Hours: Monday - Friday 9am - 5pm (Pacific)

Statute of Limitations Analysis in Eastern and Western Washington

Wendy Lee, Managing Partner OR/WA Litigation and Foreclosure, Wendy.Lee@mccalla.com

Politics in Washington are interesting. For the last 20 years I've lived here, I've heard stories about how some pockets of the Eastern (more rural) half of the state - comprised of a generally more conservative population – would like to form their own state or join with Idaho. The Western (more urban) half of the state – comprised of a generally more liberal and greater population tends to control the agenda when it comes to national politics, spending of tax money and likes to tell the eastern farmers what is best for them. But when it comes to the law and litigation of statute of limitations cases, the federal districts in each side of the state agree on a few things as is evidenced by the two opinions issued last month, within two days of each other. Though they are not appellate level, they are worth noting as they provide analysis in vacuum of legal precedent as it concerns an important topic during these extended foreclosure moratoria – Statute of Limitations.

Washington's non judicial foreclosure practice doesn't fit squarely in the statute of limitations because that statute, RCW 4.16.040(1) provides that "[a]n *action* upon a contract in writing must be commence within six years." It's clear that a non judicial foreclosure is such an action, but with the pre-foreclosure loss mitigation notices that came into the state in the wake of the earlier foreclosure crisis of the mid 2000's, Trustees and foreclosing beneficiaries in Washington have been trying to get definitive guidance on which notice is considered that "action". And, with some notices having defined waiting periods, if a beneficiary (servicer) chooses to delay the next step, notice (or dare I imply - action), does that delay toll the statute?

In *Renfroe v. Citibank NA*[1], the Federal Eastern District Court analyzed a situation where one of the notices, the Notice of Default (NOD), was issued on May 9, 2014 and the Notice of Trustee's Sale (NOTS - which under statute can be issued/recorded within 30 days after the completion of the mailing of the Notice of Default), was recorded on December 23, 2016. The borrower was litigating whether under the 6-year statute, the last applied payment to which was due for December 1, 2010, was being foreclosed in violation of a statute of limitations defense when the issuance of the NOTS, purportedly six years and 25 days after the last installment was due. Luckily the borrower lost the case, mostly because the math was wrong and the December 1, 2010 payment was actually made by the borrower, so therefore the date to be used in calculating the statute should be January 1, 2011. That said, this case gives a great perspective on the splits within the state appellate courts in Washington on this topic. We have three different Divisions (I, II, and III) and precedent on whether or not the trustee must act with diligence in between the NOD and the NOTS. And there is no "horizontal stare decisis" between or among the various divisions in this state. But *Renfroe* the court gives a handy roadmap which might fall nicely into a detailed survey request for how the statute of limitations might apply to a loan portfolio that was frozen mid-foreclosure. The Federal Eastern District Court would've fallen into Division III in its application of the tolling rule.

[1] 2020 U.S. Dist. LEXIS 198874; 2020 WL 6276945

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Division	Does the SOL calculation begin the month after the due date of last applied payment?	Does NOD toll?	Does NOTS toll?	Primary Case
I	Yes	Not if the lender doesn't follow up with the NOTS quickly	Yes	Cedar West Owners Ass'n v Nationstar Mortgage, 434 P.3d 554 (2019)
II	No, it applies six years after maturity due if it is an installment note	N/A	N/A	Terhune v. N. Cascade Tr. Servs., 446 P.3 683 (2019)
III		Yes	Yes	U.S. Bank v. Ukpoma, 438 P.3d 141 (2019)

Back to federal court, the last case to discuss was in the Western District (the more liberal populated area of the state), is *Nelson v. Specialized Loan Servicing LLC*[2]. There, the court upheld its earlier ruling that even if an NOD included payments that might have been time-barred under the installment theory where each payment obtains its own period of recovery, the Notice is not a basis for a federal Fair Debt Collection Practices Act or Washington state Consumer protection Act claim. Here, the judge did a great job laying out the fact that Statute of Limitations is a defense and a beneficiary does not need to anticipate that defense when stating the amount owed. In making this ruling, the court cited to both a 9th circuit[3] and a United States Supreme Court case, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), which others might find helpful in litigating in this murky FDCPA and lender liability for making claims on time-barred debt.

With thousands of delinquent loans not being foreclosed and delays occurring on so many of these notices, it is not clear whether these self-imposed moratoria will in fact toll the statute. Any court providing analysis on this topic is welcome and provides some light, but we are still in a state of flux in the law in Washington, so while these opinions will provide analysis, they could still go up to the 9th circuit and be adjusted by the higher courts. Stay tuned for more case law developing in the coming

[2] 2020 U.S. Dist. LEXIS 201058
[3] United States v. McGee, 993 F.2d 184 (1993)