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When You Stop Sending Payment Notices Can the Borrower Sue When You Exercise Your Default Remedies? Yes, But the Statute of Limitations Can Be Your 'Friend to Defend'.

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Loans get sold and transferred all the time. In many cases the loans become so delinquent that they are "charged off" and payment statements stop.[1] Borrowers, like in this case, may assert that enforcing default rights without giving them an ongoing update on the status of the loan is tortious. The court examined this practice in the case of *Wen v. Greenpoint Mortgage Funding, Inc.* (N.D. Cal., Nov. 22, 2021, No. 21-CV-07142-EMC) 2021 WL 5449048.

In this case, a borrower's loan was transferred by the original lender to the current lender ("**Current Lender**") in May 2017. The Current Lender foreclosed and set a Trustees' Sale in August of 2021, and the Borrower filed a lawsuit. The Borrower claimed that the failure of the Current Lender/servicer to provide payment statements on her HELOC loan after the sale of the Loan, deprived her of the right to know the default amounts and amounts to reinstate. The borrower raised claims for Fraud, Breach of Contract, Rosenthal Act, and for Unfair Competition.

> *"The Court … generally limited [continuing violation doctrine] to employment discrimination and civil rights cases, where the cumulative conduct and resultant wrong is a primary factor of the claim …"*

The Court found that all of the claims were barred by the applicable statutes of limitations (suit filed more than four years after the transfer of the loan to the Current Lender, which exceeded the limitations period for each of the claims). The Borrower sought to get out of the requirement that suit be filed within the applicable limitations period by asserting the "**Continuing Violation Doctrine**". In essence, this doctrine holds that you combine or aggregate the total of the wrongs and continue the right to raise the claims as long as the wrongs continue. So in this case, the Borrower claimed that the ongoing failure to send payment statements continued her rights to raise the claims until she filed suit and it was then that the statute of limitations should be deemed to run.

The Court reviewed the history of the Continuing Violation Doctrine in the 9th Circuit. The Court found the doctrine to be confusing and generally limited to employment discrimination and civil rights cases, where the cumulative conduct and resultant wrong

Continued on Page 27

INSIDE THIS ISSUE

President's Message 4

FEATURED ARTICLES

The Cost of Incompetence Just Went Up 6

The Statute of Limitations for Texas Foreclosure: When Time Stands Still 8

California Court of Appeal Takes Stock of Interim Attorney's Fees in Valstock 9

A Costly Lesson On The Validity Of General Releases And Loan Fees 11

STATE NEWS

California Update 14

A Busy Summer for UTA Members in Washington State 15

SB 1323 On Equity Foreclosure Sales Will Not Be Signed Into Law! 17

EDUCATION NEWS

The Reviews Are In for UTA's 47th Annual Conference 18

UTA Silent Auction Raises $2,210 19

Conference Photos 20-23

MEMBERSHIP NEWS

Elizabeth Knight Honored with Phil Adleson Award 25

Ben Levinson Receives Member of the Year Award 25

Dorothy Schick Member of the Year Winners 26

New Member of the Year Winners 26

Friend to Defund...Continued From Page 1

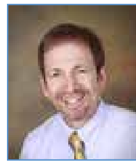
is a primary factor of the claim, as opposed to this case where the discrete act in question (failure to send a payment statement) occurs immediately and not over time and is therefore immediately actionable when the first payment statement is not sent. Accordingly, the count would not find a continuing violation of the obligation to send payment statements that tolled the statute of limitations.

The Court also unilaterally examined whether there was any basis to equitably toll the statute of limitations and found none. While the Court noted the "*Discovery Rule*" (postpones accrual of a claim until the Plaintiff discovers it), should not apply. The burden is on a Plaintiff to show lack of knowledge and a means of obtaining knowledge of the claim, and when the Plaintiff actually discovered the claim. While the Court noted that the Plaintiff could have "been in the dark" because she never got any payment statements, it also noted the converse: The Plaintiff could have simply contacted the Current Lender/Servicer for the information.

The moral of the story: The Statute of Limitations can be your "friend to defend." It is not a panacea that cures all ills. Many borrowers raise challenges to transfers of notes, assignments of deeds of trust, and substitutions of trustee, well beyond the applicable limitations period, and in many instances are allowed to assert such claims for a variety of reasons.[2] However, a borrower cannot just ignore facts and circumstances that put the borrower on notice of a claim like the one in this case, and then assert that the claims should remain viable indefinitely.

1 Note the requirements under the amended TILA/RESPA Servicing Rules ("MSR") applicable to larger servicers (See 12 CFR §1026.41). The Court did not review this regulation in coming to its decision and instead focused on the statute of limitations and defenses in resolving the case. This case involved a HELOC and HELOCS are exempt from the MSR and are separately regulated. However, I believe that the failure of covered servicers to abide by the requirements to discontinue payment statements under the MSR on covered loans, when a loan is charged off, can provide and independent basis to assert liability under the Regulation. Larger Servicers should review these requirements when determining whether to discontinue payment statements or to provide the required notice that payment statements will be discontinued.

2 See e.g. "void v voidable" arguments, allowing some borrowers' to challenge foreclosure actions or assert wrongful foreclosure claims, many years after the alleged sale of the loan or assignment of a deed of trust, it it can be argued that the document is void on its face.



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