

Zombie 2nd Mortgage Case Update October 2024



Triggering the Statute of Limitations

- SOL for each installment starts upon default
- SOL for entire loan balance starts at either:
 - The maturity date for repayment as defined by loan documents; or
 - Acceleration of the loan (at loan owner's discretion when a default occurs)

HELOCS & SOL

- *Regions Bank v. Fletcher*, 67 F.4th 797 (6th Cir. 2023) (applying Tenn. Law, discharging HELOC)
 - HELOC repayment maturity date 10 yrs, then 10 yr. SOL
- *Berger 3234 Holdings, LLC v. RCS Recovery Services, LLC*, 195 N.Y.S. 3d 790 (N.Y. App. Div. 2023)
 - 2006 HELOC repayment maturity date 5 yrs (2011), then 6 yr. SOL to foreclose; mortgage discharged
- *Piedmont Cap. Mgmt. v. McElfish*, 312 Cal. Rptr. 3d 664 (Cal. Ct. App. 2023)
 - 2006 HELOC with 10 yr. draw period, then 20 yrs. to repay (unless acceleration), in 2020 lawsuit lender can seek installments due within 4 yr. SOL period

Abandonment/Laches

- Foreclosure sale delays – “we were waiting for property values to go up.”
- *Krupnick v. Romano*, 199 N.Y.S. 3d 113 (N.Y. App. Div. 2023)
- Ten years of accrued interest canceled
- *Aspen Properties Group, LLC v. Roberts-Joachim*, 2022 WL 4376521 Conn. Super. Ct. Sept. 22, 2022), later decision, 2024 WL 163349 (Conn. Super. Ct. Jan. 9, 2024)
- Delaying HELOC foreclosure 8 yrs. after 2012 default while there was no equity in property not conclusive evidence of abandonment

HELOC as a Negotiable Note

Which SOL applies?

- *Wishengrad v. Carrington Mortg. Services*, 529 P.3d 880 (Nev. 2023)
 - 10 yr. draw period, then fixed 15-yr. repayment period (SOL for negotiable note applies to HELOC)
- *U.S. Bank v. Richardson*, 203 N.E. 3d 1290 (Ohio Ct. App. 2022)
 - SOL for negotiable notes does not apply to HELOC; instead a longer SOL for written contracts applies

Zombie 2d Servicing as Negligence

- *Cruz v. Cameron Fin. Group, Inc.*, 2024 WL 326957 (D. Ariz. Jan. 29, 2024)
- 80/20 2d mortgage from 2006
- No payments, no communications since 2010
- Borrower stated claim for Negligence in Performance of an Undertaking (Restatement of Torts)
 - “But even if a loan servicer's duty of care is limited, it remains a duty and extends to the responsibility to disclose correct information and properly service the account.”
 - Remaining silent, allowing interest and fees to accrue, made it impossible for borrower “to either plan for or have the ability to pay back the balance—forcing him into foreclosure.”

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