

DEFAULT DATE OUTSIDE SOL IN COMPLAINT AVOIDED BY EVIDENCE THAT DEFAULTS CONTINUED

The District Court of Appeal of Florida, Fifth District, recently held that a foreclosure complaint was not time-barred despite the initial default occurring outside Florida's five-year statute of limitations, because the mortgagee both alleged and proved that the borrowers defaulted on every payment due from the date of the initial default.

In so ruling, the 5th DCA applied the standards set forth by the Florida Supreme Court in *Bartram v. U.S. Bank Nat'l Ass'n*, to conclude that **the foreclosure action was not barred by the five-year statute of limitations under Fla. Stat. § 95.11(2)(c), because the mortgage was in a continuous state of default, which included defaults within the five-year statute of limitations.**

A copy of the opinion is available at: [Link to Opinion](#).

In June 2014, a mortgagee filed a foreclosure action against the borrowers alleging a default of the March 1, 2009 payment and all subsequent payments due thereafter. The borrowers filed an answer generally denying all allegations and raising the statute of limitations as an affirmative defense.

As you may recall, section 95.11(2)(c) of the Florida Statutes provides that an action to foreclose on a mortgage must be commenced within five years.

The Florida Supreme Court recently provided guidance as to application of the statute of limitations where the initial default occurred outside the five-year window, by holding (i) that **“with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage”** and; (ii) that a mortgagee is **“not precluded by the statute of limitations from filing a subsequent foreclosure action based on payment defaults occurring subsequent to the dismissal of the first foreclosure action, as long as the alleged subsequent default occurred within five years of the subsequent foreclosure action.”** *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009 (Fla. 2016)

At trial, the mortgagee introduced evidence reflecting that the borrowers failed to make any payments since the initial March 2009 default. Accordingly, because defaults had occurred within the five years prior to filing the foreclosure complaint

in June 2014, the trial court entered final judgment in favor of the mortgagee. The borrowers appealed.

On appeal, borrowers argued that dismissal of the complaint under the five-year statute of limitations was required pursuant to the 5th DCA's decision in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015).

In *Hicks*, although the complaint alleged that the borrowers were in a continuing state of default, the parties proceeded to trial on stipulated facts that referenced only the initial default, which had occurred more than five years before the new foreclosure action had been filed. Additionally, the mortgagee's counsel in *Hicks* confirmed that the sole determinative issue to resolve at trial was one of law — that the trial court supposedly erred when it failed to dismiss the foreclosure complaint with prejudice based on a default that occurred outside of the five-year statute of limitations period. *Hicks*, 178 So. 3d at 958. Accordingly, the 5th DCA in *Hicks* reversed the final judgment of foreclosure because it was based solely on a default that occurred outside of the five-year statute of limitations. *Id.* At 959. See also, *Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012 (Fla. 3d DCA 2016) (reversing final judgment of foreclosure where the bank had proceeded a trial only as to the initial default, which was more than five years after the alleged payment default).

However, in this case, **because the mortgagee both alleged and proved that the borrowers failed to make any payments from March 2009 onward, and thus defaulted within the five years prior to filing its complaint, the 5th DCA held that the action was not barred by the statute of limitations.**

Accordingly, final judgment of foreclosure was affirmed in favor of the mortgagee.