The subprime mortgage crises of 2008, which experts believe caused millions of mortgages to default, may be old news but mortgage lenders holding defaulted mortgages are starting to feel the effects and may now face a new problem which can result in the loss of the security interest. Nearly a decade after the 2008 Financial Crisis, considered the worst since the Great Depression, crippled the American economy, mortgage lenders are bringing an increasing number of foreclosure actions, but borrowers are now raising the statute of limitations as a defense. In some instances, borrowers are actually initiating actions in an effort to have courts declare mortgages invalid, thereby redefining the meaning of a "free lunch."

Mortgage lenders responded to the subprime mortgage crises, but the response was not always the initiating of a foreclosure proceeding to gain possession of the collateral securing the loan. For example, mortgage lenders may have accelerated a mortgage upon default. Acceleration of the mortgage loan, however, may have triggered the running of the statute of limitations while offering very little benefit to the mortgage lender. In other instances, foreclosure litigations may have been initiated but not litigated to conclusion. In such circumstances, the loan could have been sold, a common occurrence, and the subsequent holders of the mortgages may have opted not to proceed. In other instances, mortgage lenders may have opted not to proceed with foreclosure litigations because of some type of deficiency (or a perceived deficiency), thereby opting to voluntarily dismiss the action. Such actions may have not stopped the running of the statute of limitation.

Regardless of the circumstances, actions taken by the mortgage lender will usually always have some type of affect with regards to the statute of limitations. For example, New Jersey, New York, and Florida, three states with a large volume of defaulting mortgages, each have very different rules regarding the running of the statute of limitation. Ultimately, mortgage lenders, regardless of the jurisdiction, should be aware as to how the statute of limitations will be computed in the respective jurisdiction to ensure that the collateral securing a mortgage can be reclaimed.

The Fair Foreclosure Act, signed into law in 1995, was enacted to protect residential mortgage debtors, in furtherance of public policy of the State of New Jersey, so that home owners would be given every opportunity to keep their homes. *First Am. Title Ins. Co. v. Tilbury*, DDS # 15-2-3840 (App. Div. 2003). Section 2A:50-56.1 of the Fair Foreclosure Act, which took effect on August 5, 2009, codified the New Jersey Appellate Divisions' holding in *Security National Partners v. Mahler*, 336 N.J. Super. 101 (App. Div. 2000), regarding the applicable

statute of limitation to institute a residential foreclosure action. Prior to the enactment of the Fair Foreclosure Act, New Jersey did not have a statute of limitation addressing mortgage foreclosure actions. Courts therefore applied a twenty-year limitations period based on common law adverse possession period. Now, New Jersey's statute of limitations relative to residential mortgage foreclosures provides:

- An action to foreclose a residential mortgage shall not be commenced following the earliest of:
- a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;
- b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or
- c. Twenty years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been extended by a written instrument or payment on account has been made, the action to foreclose shall not be commenced after 20 years from the date on which the default or payment on account thereof occurred under the terms of the written instrument.

N.J.S.A. §2A:50-56.1.

Although the New Jersey statute of limitation seems simple, it is not. In the past two years, New Jersey's state and federal courts have been tasked with interrupting the Fair Foreclosure Act to determine mortgage lenders' ability to reclaim their security interests.

On November 5, 2014, the United States Bankruptcy Court for the District of New Jersey held that a mortgagee and its servicer were time-barred from enforcing their rights under an accelerated mortgage more than six years after the borrower's default pursuant to the statute of limitations set forth by the New Jersey Fair Foreclosure Act. *Washington v. Specialized Loan Servicing, LLC (In re Washington)*, 2014 BL 313767 (U.S. Bankr. D.N.J. Nov. 5, 2014). In his opinion, Judge Kaplan wrote:

- No one gets a free house. This Court and others have uttered that admonition since the early days of the mortgage crisis, where homeowners have sought relief under a myriad of state

> and federal consumer protection statutes and the Bankruptcy Code. Yet, with a proper measure of disquiet and chagrin, the Court now must retreat from this position, as Gordon A. Washington ("the Debtor") has presented a convincing argument for entitlement to such relief. So, with figurative hand holding the nose, the Court, for the reasons set forth below, will grant Debtor's motion for summary judgment.

Id. (internal quotation omitted.)
The Court focused its analysis on whether the Fair Foreclosure Act operated to make the mortgage unenforceable because the creditor accelerated the loan and then waited too long to file suit. *Id.* The Bankruptcy Court's conclusion would have resulted in the borrower effectively receiving a "free house." *Id.*However, the decision was overruled by the United States District Court for the District of New Jersey on August 11, 2015. *Specialized Loan Serving, LLC v. Washington*, 2015 BL 259401 (D.N.J. Aug. 11, 2015).

In overruling the Bankruptcy Court, the district court concluded that "acceleration" of a mortgage does not trigger the maturity date running of the statute of limitation because "there would be no functional purpose of section (c) of N.J.S.A. § 2A:50-56.1, which provides for a twenty-year statute of limitations for mortgage payment cases." *Specialized Loan Serving, LLC*, 2015 BL 259401.

The New Jersey District Court's decision saved at least one mortgage lender from suffering the ultimate penalty of losing its security interest. The decision, however, further defined the importance or, more significantly, the lack thereof, of accelerating a mortgage in New Jersey for the purposes of the statute of limitation. Acceleration, however, is critical in other jurisdiction, such as New York.

Even more recently, a mortgage lender was not so lucky when the New Jersey Superior Court, in an unpublished opinion, held that that the mortgage lender was time-barred from commencing an action to foreclose on its mortgage. In an unpublished decision, the *Shaloub* Court, applying the plain language of N.J.S.A. §2A:50-56.1,. determined that subsection (a) triggered the first possible date the statute of limitation would run. *Anim Inv. Co. v. Shaloub*, 2016 BL 221121 (Ch.Div. June 30, 2016). That is, the mortgage matured on October 1, 1995 and subsection (a) started the running of the six year statute of limitation.
The *Shaloub* Court held that the default date, which would have resulted in a later statute of limitation date, was deemed irrelevant. *Id.*

The *Shaloub* Court also determined that the statute of limitation set forth in *N.J.S.A.* §2A:50-56.1 (enacted in 2009) should be applied retroactively. *Shaloub*, 2016 BL 221121. The court concluded that the statute met New Jersey's two-part test for

retroactive application; namely, (1) whether the Legislature intended to give the statute retroactive application, and (2) whether retroactive application will result in either an unconstitutional interference with vested rights, or result in a manifest injustice. *In re D.C.*, 146 *N.J.* 50 (1996). *Id.*While the analysis underlying the retroactive application is not important, of critical importance is the fact that in New Jersey the Fair Foreclosure Act will be retroactively applied.

The June 30, 2016 decision by the *Shaloub* Court will likely lead to further litigation when homeowners continue to challenge mortgage lenders rights to foreclose their security interest based on statute of limitation grounds.

Another issue that has not been addressed in New Jersey but was noted by the New Jersey district court is the public policy consideration of permitting mortgagors to have a free home. The New Jersey District Court noted:

- As Judge Kaplan stated, no one gets a free house. Deeming the mortgage collection claim as time-barred would be inequitable. It would be contrary to public policy by depriving the appellants of any remedy for the appellee's default. As the analysis above outlines, such a conclusion would ignore the intended purpose of the statute.

Specialized Loan Serving, LLC, 2015 BL 259401 (internal quotation omitted).

The district court may have left room for a mortgage lender, that blows the statute of limitation, to make an equitable argument. However, best practices dictate that mortgage lenders review operative dates of all New Jersey residential mortgages with experienced counsel. Guidance from experienced counsel will substantially reduce the probability that mortgage lenders will suffer the fate the mortgage lender in *Shaloub* that gave away a free house.

In New Jersey the law regarding acceleration of a mortgage is clear. An acceleration of a mortgage does not trigger the running of the statute of limitation. On the other hand, in New York the acceleration of a mortgage does trigger the running of the statute of limitation.

In New York the statute of limitation for a mortgage lender to initiate a foreclosure litigation is “six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage debt has been accelerated.” N.Y. C.P.L.R. Law § 213; *Zinker v. Makler*, 748 N.Y.S.2d 780 (Appellate Div. 2002). Simply stated, mortgage lenders have six years from the maturity date of the mortgage or six years from the time the entire loan becomes

due to initiate a foreclosure litigation. The problem for lenders are those situations when mortgages are accelerated.

A standard operating procedure for mortgage lenders is to send acceleration letters upon default. However, mortgage lenders in New York must carefully monitor the acceleration date because it triggers the statute of limitation. That is, New York's six year statute of limitation starts to run from the time that mortgages are accelerated by the mortgage lenders.

Revocation of acceleration letters have been commonly employed by mortgage lenders in order to avoid running afoul of the statute of limitation. However, courts in New York can reject revocation letters when, for example, the revocation is not timely or mortgagors demonstrate substantial prejudice. In fact, a recent decision by the New York Supreme Court explained that revocation of a prior acceleration must be affirmative and unambiguous. *Beneficial Homeowner Service Corp., v. Theresa A. Tovar a/k/a Thresa Tovar,* Index No. 61092/14 (Sup. Ct. New York Co. September 15, 2015). However, this decision has been appealed and is currently before the New York Appellate Division of the Second Department. Once a decision is issued it will guide mortgage lenders on how to proceed with defaulted mortgages, acceleration of defaulted mortgages, and the use of revocation letters.

Mortgage lenders holding New York mortgages should have experienced New York counsel review acceleration and revocation letters sent with respect to all defaulted mortgages. Mortgage lenders should then institute internal procedures that track these operative dates to avoid running afoul of the statute of limitation.

In Florida a foreclosure action must be initiated within five years from date of default. Fla. Stat. Ann. §95.11. However, courts in Florida are generally liberal when determining when a statute of limitation began to run. For example, courts in Florida have routinely held that each failed mortgage payment constitutes a default that creates a basis for foreclosure and, is timely filed, if the litigation is initiated within five years. *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1006 (Fla. 2004); *Romero v. SunTrust Mortg., Inc.*, 15 F. Supp. 3d 1279 (S.D. Fla. 2014).

Until recently, however, Florida courts were split with regards to the application of the statute of limitation when cases that accelerated the mortgage were filed and, subsequently, dismissed without prejudice. In New York, two recent cases held the statute of limitation began to run once a suit was initiated and the mortgage was accelerated. *U.S. Bank National Association v. Parisi*, Index No. 66885/2014 (Sup. Ct. Suffolk Co. Oct. 14, 2015); *Ellery Beaver LLC v. HSBC Bank USA*, Index No.

506700/2014 (Sup. Ct. Kings Co. Oct. 22, 2015). Thus, when the cases were subsequently dismissed and not filed until after the six year statute of limitation lapsed, the cases were time barred.

In Florida, however, the Florida Supreme Court ruled on November 3, 2016, that Florida's statute of limitation does not bar foreclosure for subsequent missed installment payments even though the mortgage at issue had been previously accelerated when suit was filed and the suit was subsequently dismissed without prejudice. *Bartram v. U.S. Bank National Association*, 41 Fla. L. Weekly 493 (2016).

Thus, while in New York mortgages lenders' acceleration of mortgages starts the running of the statute of limitation, in Florida it does not. The slight difference between the law of the State of Florida and New York further highlights the importance of carefully monitoring default dates to ensure that foreclosure litigation is timely initiated.

Although we are nearing almost a decade since the subprime mortgage crises, mortgage lenders are holding large quantities of defaulted mortgages. Mortgage lenders should therefore take steps to minimize the likelihood of giving mortgagors free homes. Mortgage lenders should evaluate all mortgages that have defaulted to determine specific dates, such as the date of default, mortgage acceleration, and revocation of acceleration. Mortgage lenders should also evaluate all mortgages where foreclosure litigations were initiated, but subsequently dismissed.

Mortgage lenders should review all applicable dates with experienced foreclosure counsel to ensure compliance with applicable statutes of limitations periods in the applicable jurisdiction. Mortgage lenders should also work with counsel to ensure that procedures are implemented to track applicable dates on defaulted mortgages. Implementation of proper procedures will ensure that mortgage lenders protect their security interests.