BARTRAM DECISION IS GOOD FOR BORROWERS

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Court Rules No Free Houses…

The Florida Supreme Court ruled in Bartram v. U.S. Bank, N.A., SC14-1265 that lenders are not barred from filing subsequent foreclosure actions based on payment defaults after a first foreclosure action is involuntarily dismissed. In essence, one legal definition for SOL (Statute of Limitations) was replaced by a different definition (Shit Otta Luck) for borrowers! Many Florida foreclosure defense attorneys view this half filled glass of water as an empty glass rather than the full glass I see. In this report, I will show how Bartram can provide for good decisions and judgments!

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COURT RULES NO FREE HOUSES…

OVERVIEW

Predatory servicer's actions not only harm borrowers, but other defendants such as second lien holders, HOA associations, and state and federal taxing authorities. They also cost the mortgage insurers and investors with needless losses. However, the primary victims are our courts and court systems. By their predatory behavior and fraud, predatory servicers and their foreclosure mill counsel waste countless dollars of local tax money in needless court hearings and trials when in reality, they should be able to prove up their cases in a manner of weeks with the right supporting evidence via the vast amounts of easily and inexpensively retrievable data, records and evidence at their immediate disposal. Any failure to do so only raises suspicion as to the truthfulness of the foreclosing party's allegations and the accuracy, reliability, genuineness, and authenticity of their evidence.

Decades of abuse of this system of courts by bankers led to the distrust of our political, financial and judicial institutions. As our President-Elect is fond to say and I was quoted as saying in a New York Times Live Facebook Interview on July 13, 2016… "The System Is Rigged!" There is no question, that the judicial foreclosure system was definitely rigged when it became common practice for mortgage servicers, their lawyers, vendors and witnesses to engage in filing false and fraudulent claims in lawsuits; fabricating evidence and testimony; and obtaining fraudulent foreclosure judgments supported by fabricated and forged evidence and perjurious testimony.

The upheaval in our financial markets and economy over the last decade left a sour taste in American's mouths. The financial market collapse and resulting Great Recession affected many on both the fringe left and the fringe right. The resulting financial crisis also magnified the frauds and abuses of mortgage servicers that ultimately led to first, a National Foreclosure Moratorium followed by the National Foreclosure Investigation and ultimate National Mortgage Settlement.

It also led to many Americans, having been abused by the system and foreclosed on by unlawful, illegal and even criminal means, to be emboldened. Legal Abuse Syndrome is a real psychological issue similar in many ways to PTSD. It has affected countless Americans, many of whom I know. The resentment felt by many, that no one on Wall Street went to jail and only one or two persons in the mortgage industry were tried and convicted angered Americans, especially those most affected and in foreclosure, even more.

This led to thousands of lawyers across the nation to join a foreclosure defense movement. Many of them read my reports of years ago and took the tactics and strategies that I first laid out in the 90s. Produce the Note became their mantra and some judges, started questioning why so many mortgage notes were claimed lost and missing. Issues regarding documentation, fraudulent assignments and the infamous robo-signing of affidavits and assignments I first discovered in the 90s laid the foundation for arduous legal attacks on

something called standing and the legal ability and authority to foreclose on a borrower. However, what few have questioned adequately is how and why hundreds of thousands of foreclosures across the nation did not have the right paperwork and evidence to foreclose?

Yet, some of those affected, using increasing access to the Internet, were able to find my reports and forum posts to defend themselves. Some judges listened and started granting relief in the early days before the Tsunami of foreclosures hit their courtrooms before the end of the first decade of this millennium. As this process was occurring, a new body of legal work kept lawyers on all side of the fence busy and rich for over a decade now.

With each new decision, came a new wrinkle in how mortgage servicers would prosecute their fraudulent foreclosure cases. Document remediation and title cures became the norm supported by computerized templated foreclosure complaints, pleadings, motions and even affidavits that were executed with little to no review of the actual document, let alone the facts, evidence and systems supporting such legal filings. In fact, recent research reflects that even the review of affidavits for their accuracy has been automated.

This made foreclosure victims across America even angrier. Many, pushed to their limits, gained a sense of entitlement and believed they deserved a free house. While many victims believed that the lenders, in reality the servicers, couldn't prove they had a legal right to foreclose, they also developed the false belief that they could get a mortgage free home. This was a mistaken belief promulgated by many fringe alt-right movement members of the Tea Party and militia groups. However, while some were right in advancing my tactics and strategies, their goals and objectives were far from my own.

The free house concept and greed, instead of facts and justice, took hold. Pro se litigants and poorly trained Johnny Come Lately lawyers seeing a goldmine further exacerbated the escalating crisis in our courts that saw floods of fraudulent foreclosure pleadings. Bad and lazy lawyering on both sides led to frustration for judges whose courtrooms and dockets were clogged with caseloads of foreclosure cases. Even some bank leaning judges could not stomach the abuses there were seeing.

As the foreclosure scandal and notoriety grew, so did the grumblings of the foreclosure mill counsel who when caught with their hands in the foreclosure fabrication cookie jar mumbled and stuttered out comments like "judge, this is how we've always done things" and then the ultimate last ditch effort to save their case, "but judge, they don't deserve a free house!" Some judges took that to heart and despite all the best evidence, all the best facts and even some mighty good lawyering, you could always see that refrain ring in many judge's head that the borrower didn't deserve a free house and the money was owed to someone.

Many judges even openly questioned lawyers and their clients with comments like "well you do agree you owe someone, right?" Many lawyers responded, yes, but not this plaintiff. The arguments would go on and on. Some won, many more lost. Those who lost got foreclosed on or perhaps later modified. Other cases got voluntarily dismissed since the servicer knew they were relying on fraudulent and false pleadings and evidence and due to the National Foreclosure Settlement and consent agreements they reached with government regulators, they had agreed to stop such abuses and remediate the problems.

Those who won or had their cases "voluntarily" dismissed, didn't get their mortgages burned they got legal limbo. Even if no one comes to collect and no one forecloses the mortgage, the mortgage remains on the property until after the note's expiration and you can't quiet title to the property or sell the property. There really were never any real free houses, just relief from making mortgage payments.

The remainder of this report will illustrate how no free houses, is a good thing for borrowers and competent foreclosure defense attorneys.

STATUTE OF LIMITATIONS IN FORECLOSURE

Florida, like every state has statute of limitations ("SOL") statutes for filing suits and claims. In Florida, the perceived statue of limitation for foreclosure was five years. My friend and colleague, Mark Stopa, wrote and researched the SOL issue extensively. On his blog at http://www.stayinmyhome.com Stopa wrote "the concept of a 'free house' might turn some people off (particularly those who chose to keep paying their mortgage during the Great Recession)", but Stopa went on to explain how the law should work in foreclosures as it did in every other legal context that prevented plaintiffs from obtaining relief when they waited too long to file suit. Mark's view, and I might add my own view and the view of many colleagues, even some lawyers in the banking world, was that a foreclosure shouldn't be any different.

Our collective view was that when a bank accelerated the balance due under its Note and Mortgage, the clock should start running on five-year statute of limitations under Florida law.[1] If five years had passed after that acceleration, and the bank did not filed another lawsuit, the statute of limitations should bar foreclosure on that mortgage. Ultimately, years later, that could mean a free house.[2] A few courts bought that argument. In fact, many servicers bought the same argument since they didn't file another foreclosure action after the five-year expiration for fear they may further violate the law by collecting on a debt some court may rule was not owed. Supporting the argument and our collective view was that every other state in the country that had ever ruled on the statute of limitations issue related to foreclosure, ruled in against the lenders.[3]

The Bartram Case

Then, an unusual case came forward. In 2005, Lewis Bartram, obtained a $650,000 loan secured by a mortgage on his real property in St. Johns County, Florida. The mortgage was a standard Fannie Mae/Freddie Mac uniform residential mortgage with terms common in mortgages throughout the United States, including a provision requiring the lender to send a notice to the borrower advising them of any default and giving them the opportunity to cure it before the filing any foreclosure action, and further advising the borrower of their right under the mortgage to reinstate the loan after acceleration.

Concerning the right to reinstatement, mortgages and deeds in each state have uniform language that contain provisions that a borrower can pay all past-due amounts prior to the entry of a final judgment of foreclosure. The relevant provisions contained in the uniform Florida mortgage instrument are found in paragraph 19 titled "*Borrower's Right to Reinstate After Acceleration.*" The pertinent language is highlighted below:

> ***"Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred."***

Bartram stopped making payments on his mortgage on Jan. 1, 2006, which resulted in U.S. Bank, N.A. as trustee for a RMBS Trust filing a foreclosure complaint on May 16, 2006. In 2011, after the case had been pending for nearly five years, the action was dismissed after U.S. Bank failed to appear for a case management conference, which U.S. Bank didn't appeal.

However, Bartram and U.S. Bank became defendants in a separate foreclosure action brought by Bartram's ex-wife who owned a note and mortgage on the same property pursuant to a divorce action. Approximately a year after the dismissal, and six years after the filing of U.S. Bank's foreclosure action, Bartram filed a

[1] See Fla. Stat. 95.11(2)(c)).
[2] Stopa, Mark. "Statute of Limitations - The Litmus Test for the Integrity of the System - Stopa Law Firm." Stopa Law Firm. Stopa Law Firm, 02 June 2014. Web. 11 Dec. 2016. <http://www.stayinmyhome.com/statute-limitations-litmus-test-integrity-system/>.
[3] Stopa, Mark. "Statute of Limitations: We Are Right - Stopa Law Firm." Stopa Law Firm. Stopa Law Firm, 24 Jan. 2015. Web. 11 Dec. 2016. <http://www.stayinmyhome.com/blog/statute-limitations-right/>.

cross-claim seeking a declaratory judgment against U.S. Bank in a separate foreclosure action involving a second mortgage on the Property. The cross-claim sought "to cancel the mortgage and quiet title to the property, asserting that the statute of limitations barred U.S. Bank from bringing another foreclosure action." Bartram's argument was essentially that Florida's five-year statute of limitations ran from the filing of U.S. Bank's prior foreclosure action and had expired, thereby barring them from bringing another foreclosure action. The trial court agreed with Bartram and entered summary judgment in his favor, cancelling the note and mortgage and releasing U.S. Bank's lien on the Bartram property.

The Bartram Appeal

U.S. Bank naturally appealed to the Fifth District Court of Appeals in Florida who reversed the Bartram trial court and concluded that even though five years had passed since the bank's foreclosure action, it was not barred from subsequently enforcing its rights under the note and mortgage, as long as Bartram defaulted sometime after the filing of the first foreclosure action. They wrote that any "*subsequent and separate alleged default 'created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.*[4] In simple parlance, a new default created a new foreclosure cause of action.

The Singleton case cited by the Fifth DCA, was a Florida Supreme Court held that "a dismissal with prejudice in a mortgage foreclosure action does not necessarily bar," on the grounds of res judicata, "a subsequent foreclosure action on the same mortgage."[5] In Singleton, a mortgagee's foreclosure action was dismissed for failure for them to appear at a case management conference and the mortgagee later brought a second foreclosure action based on defaults that occurred after the defaults alleged in the first action. Both the trial court and Fourth DCA rejected the mortgagor's argument that the second suit was barred by res judicata.

However, the Fourth DCA's Singleton decision conflicted with another Florida Appeals Court, the Second DCA. In Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2d DCA 1963). The Florida Supreme Court certified the conflict.

Florida Supreme Court Decision on Bartram

The issue was presented to the Supreme Court in June of 2014. It took the Florida Supreme Court over two years to resolve the issues presented in the case. In doing so, the Court stated that:[6]

> The issue before the Court involves the application of the five-year statute of limitations to "[a]n action to foreclose a mortgage" pursuant to section 95.11(2)(c), Florida Statutes (2012).1 The Fifth District Court of Appeal relied on this Court's reasoning in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), rejecting that the statute of limitations had expired. Because of the importance of this issue to both lenders and borrowers, the Fifth District certified to this Court a question of great public importance, which we have rephrased to acknowledge that the note in this case is a standard residential mortgage, which included a contractual right to reinstate:
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> DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?

[4] " Id. at *6 (quoting Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004)).
[5] See Singleton, 882 So. 2d at 1005
[6] *Bartram v. U.S. Bank, N.A.*, SC14-1265 (Fla. Nov. 3, 2016)

In the Bartram decision, the Florida Supreme Court referred to its decision in Singleton that:

> Our recognition in Singleton that each new default presented a separate cause of action was based upon the acknowledgement that because **foreclosure is an equitable remedy**, "[t]he ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage." Id. at 1008. Thus, the failure of a mortgagee to foreclose the mortgage **based on an alleged default** did not mean the mortgagor had automatically and successfully defeated his or her obligation to make continuing payments on the note.

In analyzing the context between the application of Florida's Statute of Limitations statute to mortgage foreclosure cases after the Singleton decision, the Court wrote:

> In cases concerning mortgage foreclosure actions, since our decision in Singleton, both federal and state courts have applied our reasoning in Singleton in the statute of limitations context and have concluded that because of "the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship," an "adjudication denying acceleration and foreclosure" does not bar subsequent foreclosure actions based on separate and distinct defaults. See id. at 1007. As the Fourth District explained, under Singleton, a "new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action." Star Funding Sols., LLC v. Krondes, 101 So. 3d 403 (Fla. 4th DCA 2012). That is because, as the First District has also explained, this Court's "analysis in Singleton recognizes that a note securing a mortgage creates liability for a total amount of principal and interest, and that the lender's acceptance of payments in installments does not eliminate the borrower's ongoing liability for the entire amount of the indebtedness." Nationstar Mortg., LLC v. Brown, 175 So. 3d 833, 834 (Fla. 1st DCA 2015).

The Court also opined 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.*" Please note for future reference that it provides the mortgagee the right, but not an obligation. They can choose and they can waive that right. Thus, identification of the mortgagee is paramount. Also, the Court went onto opine:

> Involuntary dismissal of a legal action by a court under Rule 1.420(b) terminates a court's jurisdiction over that action and may be with or without prejudice. A dismissal under Rule 1.420(b) operates as an adjudication on the merits as long as the dismissal was not for "**lack of jurisdiction or for improper venue or for lack of an indispensable party**," neither of which were a basis for the trial court's dismissal of the Bank's foreclosure action in this case

It also added:

> While **a dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default as long as the action was brought within five years of the default** per section 95.11(2)(c), critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action. As the federal district court in Dorta reasoned, "**if the mortgagee's foreclosure action is *unsuccessful for whatever reason*, the mortgagee still has the right to file subsequent foreclosure actions—and to seek acceleration of the entire debt—so *long as they are based on separate defaults*.**" 2014 WL 1152917 at *6 (emphasis added). Accord Espinoza v. Countrywide Home Loans Servicing, L.P., No. 14-20756-CIV, 2014 WL 3845795, at *4 (S.D. Fla. Aug. 5, 2014) (finding the issue of whether the initial foreclosure action was dismissed with or without prejudice a distinction that was "irrelevant" to its analysis of whether acceleration of a mortgage note barred a subsequent foreclosure action brought outside the statute of limitations period

Critical to the arguments, facts, tactics and issues I will present later, is the following language taken from the Bartram decision:

> Our conclusion is buttressed by the reinstatement provision of the Residential Mortgage that by its express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due as if no acceleration had occurred. Specifically, the reinstatement provision in paragraph 19 of Bartram's form residential mortgage gave Bartram **"the right to have enforcement of this Security Instrument**

> **discontinued at any time prior to the earliest of . . . (c) entry of a judgment enforcing this Security Instrument," as long as Bartram "(a) pa[id] the Lender all sums which then would be due under this Security Instrument and Note as if no acceleration had occurred."**
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> Under the reinstatement provision of paragraph 19, then, even after the optional acceleration provision was exercised through the filing of a foreclosure action—as it was in this case—**the mortgagor was not obligated to pay the accelerated sums due under the note until final judgment was entered and needed only to bring the loan current and meet other conditions—such as paying expenses related to the enforcement of the security interest and meeting other requirements established by the mortgagee-lender to ensure the *mortgagee-lender's interest in the property* would remain unchanged**—to avoid foreclosure. **"Stated another way, despite acceleration of the balance due and the filing of an action to foreclosure, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise."** Beauvais, 188 So. 3d at 947. Or, as the Real Property Law Section of the Florida Bar has explained, **"[t]he lender's right to accelerate is subject to the *borrower's continuing right to cure*."** Brief for The Real Property Probate & Trust Law Section of the Florida Bar at 8, Beauvais, 188 So. 3d 938 (Fla. 3d DCA 2016), 2015 WL 6406768, at *8. In the absence of a final judgment in favor of the mortgagee, **the mortgagor still had the right under paragraph 19 of the Mortgage, the reinstatement provision, to cure the default and to continue making monthly installment payments.**
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> Accepting Bartram's argument that the installment nature of his contract terminated once the mortgagee attempted to exercise the mortgage contract's optional acceleration clause—ignoring the existence of the mortgage's reinstatement provision—would permit the mortgagee only one opportunity to enforce the mortgage despite the occurrence of any future defaults. As we cautioned in Singleton, "justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default." 882 So. 2d at 1008. Following to its logical conclusion Bartram's argument that acceleration of the loan was effective before final judgment in favor of the mortgagee-lender in a foreclosure action would mean that the mortgagor-borrower would owe the accelerated amount after the dismissal, effectively rendering the reinstatement provision a nullity, and—in most cases—leading to an unavoidable default.

In analyzing the Bartram case, the Court came to some opinions that open several doors I have been advocating to foreclosure defense counsel for years when it wrote:

> Here, the Bank's first foreclosure action was involuntarily dismissed, and therefore ***there was no judicial determination that a default actually occurred.*** Thus, even if the note had been accelerated through the Bank's foreclosure complaint, the dismissal of the foreclosure action had the effect of revoking the acceleration. By the express terms of the reinstatement provision, **if, in the month after the dismissal of the foreclosure action, Bartram began to make monthly payments on the note, *the Bank could not have subsequently accelerated the entire note until there were future defaults.*** Once there were future defaults, however, the Bank had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default.
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> **There have been many claims of unfair and predatory practices by banks and mortgage holders in the aftermath of the financial crisis that shook the country, and in particular, Florida. See, e.g., Pino v. Bank of N.Y., 121 So. 3d 23, 27 (Fla. 2013) (discussing allegations of fraudulent backdating of mortgage assignments); see also In re Amends. to Fla. Rules of Civ. Pro.—Form 1.996, 51 So. 3d 1140 (Fla. 2010) (noting the *necessity for verification of ownership of the note* or *right to enforce the note* in a foreclosure action because of *"recent reports of alleged document fraud and forgery in mortgage foreclosure cases"*).** Some of these claims have included allegations that mortgage holders have precipitously sought foreclosure even though the mortgagor missed only one or two payments and attempted to cure their defaults. In this case, quite the opposite is true. **Bartram raised no defense as to the terms of the Mortgage and note itself.** His sole claim is that the Bank lost the right to seek foreclosure of the Mortgage based on distinct defaults that occurred subsequent to the dismissal of the initial foreclosure complaint.

In a consenting in judgment only opinion, Justice Lewis saw some of the same practical issues I am aware of in this so-called victory for lenders. It opens a Pandora's box of legal issues:

> I am troubled by the expansion of Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), to potentially any case involving successive foreclosure actions. Other courts in this State have already broadly applied Singleton—a decision involving res judicata and dismissal with prejudice—to cases that were either dismissed for lack of prosecution or voluntarily dismissed by the note-holder, as well as to cases that concern the statute of limitations, without careful consideration of the procedural distinctions of each case. E.g., In re Anthony, 550 B.R. 577 (M.D. Fla. 2016); Dorta v. Wilmington Tr. Nat'l Ass'n, 2014 WL 1152917 (M.D. Fla. 2014); Romero v. Suntrust Mortg., Inc., 15 F. Supp. 3d 1279 (S.D. Fla. 2014); Kaan v. Wells Fargo Bank, N.A., 981 F. Supp. 2d 1271 (S.D. Fla. 2013); Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954 (Fla. 4th DCA 2014); see also In re Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 105-06 (N.C. Ct. App. 2015) (relying on Singleton in a case involving previous voluntary dismissals and the statute of limitations). Today's decision will only continue that expansion, which I fear will come at the cost of established Florida law and Floridians who may struggle with both the costs of owning a home and uncertain behavior by lenders. I therefore respectfully concur in result only.
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> At its narrowest, Singleton simply held that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." 882 So. 2d at 1006-07 (emphasis supplied). However, as has been noted elsewhere, Singleton left several matters unanswered:
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> > **[T]he Supreme Court omitted explanation of 1) *what constitutes a valid new default after the initial round of default, acceleration, foreclosure filing, and dismissal*; 2) *how the fact-finder below determines that a valid new default has occurred*; and 3) *what conditions constitute valid new default*, including *whether the lender must reinstate the original note and mortgage terms in the interim or serve a second notice of intent to accelerate.* Moreover, the court in no way addressed the effect of the involuntary dismissal on the statute of limitations.**
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> Andrew J. Bernhard, Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures, Fla. B.J., Sept.-Oct. 2014, at 30, 32. **Given the procedural posture of this matter and the *relatively sparse record before this Court*, the decision today fails to address *evidentiary concerns* regarding how to determine the manner in which a mortgage may be reinstated following the dismissal of a foreclosure action, as well as whether a valid "subsequent and separate" default occurred to give rise to a new cause of action.** See Singleton, 882 So. 2d at 1008. Instead of addressing these concerns, the Court flatly holds that the dismissal itself—for any reason—"decelerates" the mortgage and restores the parties to their positions prior to the acceleration without authority for support. Majority op. at 3.
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> **In this case, there is *no evidence contained in the record* before this Court to show whether the parties tacitly agreed to a "de facto reinstatement" following the dismissal of the previous foreclosure action.** Further, despite the assumption of the majority of the Court to the contrary, **the mortgage itself did not create a right to reinstatement following acceleration** and the dismissal of a foreclosure action. The **contractual right to reinstatement under the terms of this mortgage existed only under specific conditions**, which do not appear to have been satisfied in the record before this Court. **Parties, *particularly those as sophisticated as the banks and other lenders that routinely engage in such litigation, should be required to present evidence that the mortgage was actually decelerated and reinstated*, rather than require our courts** to fill in the blank and assume that deceleration automatically occurred upon dismissal of a previous foreclosure action.
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> Instead, I find myself more closely aligned with the dissenting opinion of Judge Scales in Beauvais, 188 So. 3d at 954 (Scales, J., dissenting). A majority of the en banc Third District Court of Appeal reached the same conclusion as the majority of this Court does today regarding very similar facts. By contrast, Judge Scales, joined by three of his colleagues, **raised several concerns that arise from the conclusion that a mortgage is automatically decelerated and reinstated following the dismissal of a foreclosure action for any reason.**
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> First, Judge Scales pointed out that the mortgage in Beauvais, like the mortgage in this case, **created the borrower's right to reinstatement only under specific conditions, which did not include dismissal of a prior foreclosure action.** Id. at 956-57 ("**Neither the note nor the mortgage contain any provision reinstating the installment nature**

of the note if, after acceleration, a lender foreclosure action is dismissed."). Further **reviewing the clear terms of the mortgage, Judge Scales explained that the *mortgage ceased to be an installment contract upon the exercise of the lender's right to acceleration*.** Id. at 961-62. **Thus, the conclusion that a court's dismissal of a foreclosure action itself can end acceleration and reinstate the mortgage ignores basic principles of Florida contract law:**

The majority opinion rewrites the parties' note and mortgage to create a reinstatement provision—i.e., reinstating the installment nature of the note, as if acceleration never occurred, upon any dismissal of any lawsuit—that the parties did not include when drafting their documents. Singleton does not say this; the parties' contract documents certainly do not say this; and Florida law is repugnant to the majority's insertion of a provision into the parties' private contract that the parties themselves most assuredly omitted. [FN. 23]

Moreover, Judge Scales cogently explained that the overbroad construction of Singleton will undermine its limited holding. Singleton indicated that "**an adjudication denying acceleration and foreclosure**" should not bar a successive foreclosure predicated upon a "**subsequent and separate alleged default.**" 882 So. 2d at 1007, 1008. Yet, under the majority decisions of the Third District and this Court, any dismissal of a foreclosure action can support a successive foreclosure action. See Beauvais, 188 So. 3d at 963-64 (Scales, J., dissenting). The form dismissal in Beauvais should not constitute an "adjudication denying acceleration and foreclosure," which could, at least according to Singleton, restore the parties to their respective pre-acceleration positions. Id. at 964 (quoting Singleton, 882 So. 2d at 1007). **In light of the even more vague dismissal at issue in this case, I agree with Judge Scales' warning that "[w]e should be reluctant to hold that a trial court's form dismissal order visits upon the borrower and lender a host of critical, yet unarticulated, adjudications that fundamentally *change the parties' contractual relationship* and are entirely unsupported by the existing law or by the record below.**" Id. at 965.

Finally, the expansion of Singleton's holding that res judicata "does not necessarily" bar the filing of successive foreclosure actions to the statute of limitations ignores critical distinctions between these two doctrines, at a serious cost to the statute of limitations and the separation of powers. As long recognized in this State, res judicata is a doctrine of equity not to "be invoked where it would defeat the ends of justice." Id. at 967 n.31 (citing State v. McBride, 848 So. 2d 287, 291 (Fla. 2003); Aeacus Real Estate Ltd. P'ship. v. 5th Ave. Real Estate Dev., Inc., 948 So. 2d 834 (Fla. 4th DCA 2007)); see also Singleton, 882 So. 2d at 1008 (citing deCancino v. E. Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973)). **However, "equity follows the law"; therefore, *equitable principles are subordinate to statutes enacted by the Legislature*, including the statute of limitations. May v. Holley, 59 So. 2d 636 (Fla. 1952)**; Beauvais, 188 So. 3d at 967-68 (Scales, J., dissenting) (citing Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Cragin v. Ocean & Lake Realty Co., 133 So. 569, 573-74 (Fla. 1931)). **This untenable extension of an equitable, judicial doctrine into an area of law expressly governed by legislative action veers perilously close to violating the separation of powers.** Nonetheless, the majority opinion of this Court fails to recognize these concerns and justifies the imposition of Singleton's equitable focus onto the statute of limitations by simply reviewing the decisions of federal and Florida courts that have reached this same conclusion without acknowledging the critical distinctions between res judicata and the statute of limitations.

I recognize the concern raised by this Court and others regarding the need to avoid encouraging delinquent borrowers from abusing the lending process by remaining in default after an initial foreclosure action is dismissed. See Singleton, 882 So. 2d at 1008; see also Fairbank's Capital Corp. v. Milligan, 234 Fed. Appx. 21, 24 (3d Cir. 2007) (relying on Singleton and **seeking to avoid "encourag[ing] a delinquent mortgagor to come to a settlement with a mortgagee on a default in order to later insulate the mortgagor from the consequences of a subsequent default").** Nonetheless, these legitimate policy concerns should not outweigh the established law of this State. In light of the narrow holding of Singleton, I fear that its expansion today to a case involving a previous dismissal (presumably) **without prejudice and no clear reinstatement of the mortgage terms in either the note or the facts of this limited record will lead to inequitable results. Just as the courts should not encourage mortgage delinquency, so too should they avoid encouraging lenders from abusing Florida law and Floridians by "retroactively reinstating" mortgages after many of those lenders initially slept on their own rights to seek foreclosures**. See Bernhard, supra, at 27. Therefore, I concur in result only.

LENDER'S LEGAL VIEW OF BARTRAM

Years ago in my social research days, I learned a few lessons that have enabled me to view and analyze things a bit differently than others. I recognize that I have both nurtured and natural biases from my own temperamental genetics and environment. As such, I always look at opposing arguments, views, research and analyses that challenge not only conventional thinking, but my own personal views and thinking as well. When legal issues arise that are related to mortgages, promissory notes, securitization, servicing and foreclosure, I always go to the blogs, websites, and papers written on the subject by nationally recognized law firms who often represent lenders and servicers.

In the Bartram decision, I found no shortage of nationally recognized firms who wrote their analyses and opinions on the Bartram matter. A few identified and analyzed issues I saw in the decision and others took their own myopic view in their analyses. The following reflects some of the common lender's viewpoints on the Bartram decision.

Baker Donelson

Baker Donelson is the nation's 60th largest law firm, composed of 700 attorneys covering over 30 practice areas. In January of 2017, the law firms of Baker Donelson and Ober|Kaler plan to merge, keeping the Baker Donelson name, but will then employ more than 800 attorneys and will be one of the nation's top 50 law firms. The following is their analysis of the Bartram decision.[7]

> In Bartram, the Florida Supreme Court affirmed the Fifth District Court of Appeal decision that held that a lender is not barred from filing subsequent foreclosure actions based on payment defaults after a first foreclosure action is involuntarily dismissed, provided that the subsequent default occurred within five years of the newly-filed action. The court limited its holding to cases that were involuntarily dismissed and where the mortgage at issue contains a clause granting the *mortgagor the right to reinstate after acceleration*. The court also determined that whether the initial foreclosure action was dismissed with or without prejudice was immaterial to its decision.
>
> In reaching its decision, the court analyzed and reaffirmed its prior holding in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004) as reflected above that basically held that res judicata did not bar a ***second foreclosure action which alleged a subsequent and separate default from that alleged in first foreclosure action.*** The court analyzed the subsequent Florida appellate court and federal court opinions applying Singleton to statute of limitations cases. **The court found it significant that the *mortgage at issue contained a provision entitling the borrower to reinstate after acceleration of the debt at any time* before a foreclosure judgment**. Quoting the Third District Court of Appeal, the Bartram court stated "***despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise***." Bartram at 21–22 (quoting Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d 938, 947 (Fla. 3d DCA 2016)).
>
> The court ultimately concluded that "*[t]he Fifth District properly extended our reasoning in Singleton to the statute of limitations context in a mortgage foreclosure action.*"[8] The court reasoned that "the dismissal returned the parties back to 'the same contractual relationship with the same continuing obligations.'" Id. "**Therefore, the Bank's attempted prior acceleration in a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations to bar future foreclosure actions based on separate defaults.**" Id.
>
> Baker counsel questioned whether the Bartram decision applied to cases that were voluntarily dismissed, but noted the Court recently accepted jurisdiction of a statute of limitations case where a prior foreclosure was voluntarily

[7] Cann, Eve A., Joshua Levine, and Sarah-Nell H. Walsh. "*Bartram Affirmed: Florida Supreme Court Provides Guidance For Filing a Successive Foreclosure Action Post Dismissal.*" Bartram Affirmed: Florida Supreme Court Provides Guidance For Filing a Successive Foreclosure Action Post Dismissal | Baker Donelson. Baker Donelson, 3 Nov. 2016. Web. 13 Dec. 2016. <http://www.bakerdonelson.com/Bartram-Affirmed-Florida-Supreme-Court-Provides-Guidance-For-Filing-a-Successive-Foreclosure-Action-Post-Dismissal-11-03-2016>.

[8] Bartram at 25

dismissed by the mortgagee.[9] They also noted that the Bartram decision didn't address ***how to allege a separate default in a subsequent foreclosure action***.

Their analysis also emphasizes contradictions in the opinion as to the **effect of the dismissal on *any outstanding installment payments*** since on one hand, **it appeared to hold that the mortgage loan would be reinstated by the involuntary dismissal and that *all installment payments that came due up to the time of the dismissal are wiped clean***, and the **borrower can resume making monthly mortgage payments as of the date of dismissal.**[10]

While later in the opinion, it states that the parties are restored to their pre-foreclosure complaint status, which would suggest that the borrower must cure all past defaults less than five years old to reinstate the loan (Id. at 24). Finally, the opinion draws a distinction between involuntary dismissals with and without prejudice in relation to the "mortgagee's ability to collect on past defaults." Id. at 20. Therefore, when a post-dismissal cause of action for foreclosure accrues and what past payments are at issue in it are open questions.

Burr & Forman

Burr & Forman is a Birmingham, Alabama based law firm that has 270 attorneys and is the 162nd largest firm in the United States. The firm has offices in AL, FL, GA, MS and TN. Soon after the decision, here part of the analysis they provided:[11]

The vast majority of the opinion is favorable to lenders and it ensures that borrowers in continuous default cannot avoid their mortgage obligation simply by virtue of a lender's prior unsuccessful attempt to foreclose. In a paragraph full of nuance, the Court expounded on its holdings stating that:

> "The Fifth District determined that the involuntary dismissal was with prejudice but concluded that 'the distinction is not material for purposes' of the statute of limitations analysis. See Bartram, 140 So. 3d at 1013 n.1. We agree. While a dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default as long as the action was brought within five years of the default per section 95.11(2)(c), critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action. As the federal district court in Dorta reasoned, 'if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file subsequent foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults.'" (Florida Supreme Court's emphasis) (citations omitted).

There are a number of takeaways from this portion of the opinion. First, **the Court has made it abundantly clear that, for purposes of the statute of limitations, whether the prior action was dismissed with or without prejudice has no bearing on whether a suit on a subsequent default is time barred**. Previously, Florida's Third District Court of Appeal held that the distinction between dismissal with and without prejudice was a crucial distinction for purposes of a statute of limitations analysis, though the Third District Court of Appeal later retreated from this position on en banc rehearing. See Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d 938, 947 (Fla. 3d DCA 2016). Second, the Florida Supreme Court has **made clear that only where the default is within five years and the prior dismissal was without prejudice, may suit be brought again on the same act of default**. Third, **where there is a new default post-dismissal, the lender may file a second subsequent foreclosure action and again elect to accelerate the entire debt so long as it does so within five years of the new default**. Finally, the **Court held there is no need for the lender to send a "de-acceleration" notice, and instead the mere dismissal of the action returned the parties to their pre-complaint, pre-acceleration status quo**. This eliminates the majority of the controversy surrounding Florida's statute of limitations for mortgage foreclosure.

[9] Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon, 198 So. 3d 1140 (Fla. 2d DCA 2016), review granted, SC16-1680 (Fla. Nov. 2, 2016).
[10] Bartram at 23
[11] Agnello, Nicholas S. "*Florida Supreme Court Issues Landmark Ruling on Statute of Limitations for Foreclosure: Bartram Affirmed.*" Burr & Forman. Burr & Forman, 03 Nov. 2016. Web. 13 Dec. 2016. <http://www.burr.com/2016/11/03/florida-supreme-court-issues-landmark-ruling-statute-limitations-foreclosure-bartram-affirmed/>.

Another area of contention between borrowers and lenders has been **whether or not the lender may seek to recover the full unpaid balance in a re-filed action or is limited to only amounts which became due within the last five years. Since the issues in this case related solely to a declaratory judgment and quiet title, there is only dicta on this issue and perhaps not a definitive holding- but the dicta is promising for lenders.** The opinion is replete with language that suggests that **so long as the lender has a non-time barred cause of action (i.e. a default subsequent to the dismissal of the prior foreclosure which is within five years of the new filing) the lender may accelerate the "*entire amount due under the note and mortgage*" in a re-filed action.** For example, the Court stated 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.***" This suggests that in a re-filed action based on a new default within the last five years, the ***lender may file a foreclosure in which it accelerates the whole debt due under the note- even those sums which became due over five years ago and were made the subject of a prior foreclosure action***. However, the Florida Supreme Court did state that "*[w]hether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults.*" **This suggests that those defaults encompassed by a prior foreclosure action that was dismissed with prejudice may not be recoverable in a subsequent foreclosure action by virtue of res judicata, even if defaults which occurred after the dismissal with prejudice can be recovered and used as the basis for a new non-time barred foreclosure.**

The Court went on to analyze what ***impact the dismissal of a prior foreclosure action would have on the right to reinstate.*** The Court relied on paragraph 19 of the mortgage at issue, which is language found in many if not most industry standard uniform mortgage instruments, which provides that: "*the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of . . . (c) entry of a judgment enforcing this Security Instrument," as long as Bartram "(a) pa[id] the Lender all sums which then would be due under this Security Instrument and Note as if no acceleration had occurred.*" (emphasis supplied) Relying upon this language, the **Court held that until the entry of a final judgment, the borrower was not obligated to pay the accelerated amount – rejecting the borrower's argument that a prior election to accelerate placed all payments at issue. However, in an interesting extension of this logic**, the Court held that, "**[b]y the express terms of the reinstatement provision, if, in the month after the dismissal of the foreclosure action, Bartram began to make monthly payments on the note, the Bank could not have subsequently accelerated the entire note until there were future defaults.**"

Despite the specter of immediate post-dismissal reinstatement under paragraph 19 preventing re-filing (a rare event indeed), the Florida Supreme Court's long awaited Bartram opinion is a relief to the mortgage banking industry in Florida. **It opens the door to re-file a large number of foreclosure actions against Florida's most troublesome borrowers – such as those who have been in perpetual state of default for over five years. While there had been some hope amongst borrower's counsel that these habitual non-payers could secure *free homes through a tortured reading of Florida's statute of limitations, the Florida Supreme Court recognized that neither Florida law nor the interests of justice will permit such an absurd result.***

Bradley Arant Boult Cummings

Bradley is a national law firm founded in 1870 that is based in Birmingham, Alabama with offices in Alabama, Florida, Mississippi, North Carolina, Tennessee, Texas, and the District of Columbia. The firm has a Financial Services Litigation and Compliance Team that offers legal services to banks, bank holding companies, mortgage servicers, home mortgage lenders, and other consumer finance companies in the areas of litigation, regulatory enforcement and investigations, regulatory compliance, and special projects.

Key to my later analysis is Bradley's headline on their blog about the Bartram decision that reads "No Free Houses - Florida Supreme Court Approves Fifth DCA's Bartram Decision and Extension of Singleton v. Greymar." Again, the No Free Houses mantra is executed. In their analysis, Bradley wrote:[12]

[12] Samsing, E. Tyler, and Brian Alexander Wahl. "No *Free Houses-Florida Supreme Court Approves Fifth DCA's Bartram Decision and Extension of Singleton v. Greymar | Financial Services Perspectives.*" Financial Services Perspectives. Bradley Arant Boult Cummings LLP, 08 Nov. 2016. Web. 13 Dec. 2016. <https://www.financialservicesperspectives.com/2016/11/no-free-houses-florida-supreme-court-approves-fifth-dcas-bartram-decision-and-extension-of-singleton-v-greymar/>.

> **The mortgage industry scored a significant victory** last week when the Florida Supreme Court released its decision in Bartram v. U.S. Bank, N.A. broadly approving of the approach taken by the Fifth District Court of Appeal and other courts in addressing the application of the statute of limitations in the context of an action for foreclosure.
>
> Bartram leaves several significant questions unanswered. **Is it possible that there could be a different rule for voluntary dismissals? How does Bartram apply to mortgages with automatic, as opposed to optional, acceleration clauses? *How do lenders account for time-barred installment defaults in calculating amounts due and owing*?** Putting these questions aside for another day, **Bartram is a big win for mortgage lenders which appears to have ended the debate over "free houses" in Florida.**

Greenberg Traurig

Greenberg Traurig (officially Greenberg Traurig, LLP and Greenberg Traurig, PA) is an international law firm founded in Miami, Florida that has 37 offices in the United States, Latin America, Europe, the Middle East and Asia and is the 3rd largest law firm in the United States with 1,608 attorneys in the US and 1,800 attorneys worldwide. The firm has represented a number of my friends and clients and works with lenders in major deals. It's analysis of Bartram is as follows:[13]

> The Court's decision in Bartram resolves an important issue in Florida and provides long-awaited clarity to this heavily ligated statute of limitations defense in the Florida courts. Bartram clarifies that a dismissal, with or without prejudice, in a foreclosure action involving a standard form residential mortgage with a reinstatement provision simply returns the parties to their pre-foreclosure relationship. **Following the dismissal, the Borrower is given an opportunity to continue making his or her monthly payments, and the lender retains the right to file a new foreclosure action based on any default occurring within the statute of limitations.** Whether a different result would have been reached if the contract lacked a reinstatement provision remains an open question to be decided another day. With this decision, however, the backlog of most foreclosure cases pending in the Florida courts can now proceed with borrowers and lenders knowing the precise application of the statute of limitations defense.

Locke Lord

Locke Lord LLP is an American law firm of approximately 1,000 lawyers with 19 domestic and four overseas offices and is consistently voted as one of the top 100 most prestigious law firms in the world. In fact, it was my family's law firm for a time in Texas. The firm has a Florida office that authored the following:[14]

> The Court based its decision upon two factors. The first was the Court's prior decision in *Singleton v. Greymar*. There, the Court had concluded, in the context of res judicata analysis, that **each payment default under a note and mortgage gives rise to a separate right of action upon which the mortgagee may sue**. The Bartram Court concluded that this was equally true in the statute of limitations context: "[W]ith each subsequent default, the statute of limitations runs from each new default, providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage."
>
> The second factor was that **the standard residential form mortgage provided that the borrower had the right to reinstate the loan following acceleration (by paying amounts past due and curing defaults)** as well as to assert defenses to acceleration. Upon reinstatement, the loan obligations would be fully effective as if no default had occurred. Thus, "[i]n the absence of a final judgment in favor of the mortgagee, the mortgagor still had the right to . . . to cure the default and continue making monthly installment payments."
>
> The issuance of the Bartram decision removes the specter of foreclosure claims being time barred based upon nothing more than a prior involuntary dismissal. No matter when that initial acceleration occurred, the mortgagee's right to

[13] Mello, Kimberly A., Michele L. Stocker, and Jonathan S. Tannen. "*Alerts.*" *In Bartram, Florida Supreme Court Holds That Statute Of Limitations Does Not Bar The Filing Of A Second Mortgage Foreclosure Action* - Greenberg Traurig LLP. Greenberg Traurig, 14 Nov. 2016. Web. 13 Dec. 2016. <http://www.gtlaw.com/News-Events/Publications/Alerts/199610/In-Bartram-Florida-Supreme-Court-Holds-That-Statute-Of-Limitations-Does-Not-Bar-The-Filing-Of-A-Second-Mortgage-Foreclosure-Action>.

[14] Cunningham, Thomas J., Michael De Simone, and Brandon T. White. "*Locke Lord QuickStudy: Florida Supreme Court Holds That Limitations Period Does Not Bar Second Foreclosure Within 5 Years of Default Without Regard to Date of Original Acceleration.*" Locke Lord. Locke Lord, 4 Nov. 2016. Web. 13 Dec. 2016. <http://www.lockelord.com/newsandevents/publications/2016/11/flsupremecourtcunningham>.

foreclose remains alive with respect to payments that fell due no more than five years prior to the filing of the subsequent foreclosure.

As a footnote, the opinion states, "**critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action." Why this would matter outside the res judicata context is unclear. This issue may be the next battleground because a later default date could impact adversely the amount that a mortgagee may recover in foreclosure.**

McCalla Raymer

McCalla Raymer Pierce, LLC is a provider of legal services to the mortgage banking industry and represents over a hundred financial institutions, investors, servicers, and credit unions through every stage of default. The Firm is also active in working with legislators on both the state and federal level to assure their financial clients' rights are protected. The United States Foreclosure Network ("USFN") is a group of foreclosure and default servicing firms across America. They maintain an article blog of legal issues pertinent to mortgage servicers. On the site, two lawyers from McCalla Raymer provided one of the foreclosure counsel's analysis of the Bartram decision:[15]

1) **A dismissed foreclosure case does not prevent suit on a *separate and subsequent default*.**

The Bartram panel affirms the consistent findings of the Florida District Courts of Appeals that **dismissal of a foreclosure case does not bar the refiling of a foreclosure on the same mortgage based upon a different date of default.** The Florida Supreme Court found that when foreclosure actions are dismissed, lenders and borrowers are returned to their pre-foreclosure complaint status with the same continuing obligations. One exception: if the default is within five years and the prior dismissal was without prejudice, a suit may be brought on the same default date.

(2) **The type of prior dismissal, with or without prejudice, is immaterial for re-filing.**

Bartram follows the prevailing opinion that **whether a previous foreclosure was dismissed with or without prejudice, it does not affect the lender's rights to a new foreclosure.** This is because, as Bartram points out, the **new foreclosure is a new cause of action, completely independent of the previous suit, as long as it is based on a subsequent default date.** However, the **Court limited its holding to cases that were involuntarily dismissed and where the subject mortgage contains language granting the borrower the right to reinstate post-acceleration.** The Court does make the distinction between involuntary dismissals, with and without prejudice.

(3) **Deceleration of the debt is not necessary.**

In a handful of previous Florida District Court opinions, there was discussion that the bank should be required to perform an overt act of deceleration in order to allow acceleration of a new default after dismissal. The Bartram panel held that, "**the dismissal itself — for any reason — 'decelerates' the mortgage and restores the parties to their positions prior to the acceleration.**" Therefore, it is not necessary to provide a notice of deceleration.

(4) **Where there is a new default (post-dismissal), the default date must be within five years of the new foreclosure.**

The opinion states that, "**the mortgagee, also referred to as the lender, was 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** [emphasis added]."

[15] Bond, Jane, and Robyn Katz. "*Florida Supreme Court Rules on Statute of Limitations: Bartram v. U.S. Bank.*" Blog post. USFN. McCalla Raymer Pierce, LLC, 29 Nov. 2016. Web. 13 Dec. 2016. <http://www.usfn.org/blogpost/1296766/Article-Library>.

(5) What questions still remain about the statute of limitations as to mortgage foreclosures in Florida following this opinion?

The opinion only answers the question raised and leaves many questions unanswered. **Foreclosures that are voluntarily dismissed by the mortgagee *may not be covered by this holding***. However, the Florida Supreme Court recently accepted jurisdiction of a Second District case wherein the prior foreclosure was voluntarily dismissed, Bollettieri Resort Villas Condominium Association, Inc. v. Bank of New York Mellon. **This case will hopefully provide some guidance on this remaining issue**.

McGlinchey Stafford

McGlinchey Stafford is New Orleans based law firm employing 170 lawyers that focus on corporate defense litigation. It developed the following analysis of Bartram:[16]

1. **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.**"

2. "**When a mortgage foreclosure action is involuntarily dismissed pursuant to Rule 1.420(b), either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent default**s. Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage." (emphasis added).

3. "**[W]ith 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.**"

Further, in its holding, the Florida Supreme Court specifically praised the "excellent amici briefs submitted by the Business Law Section of the Florida Bar . . . at the request of the Third District in Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d 938 (Fla. 3d DCA 2016)" (see footnote 2). This brief was authored by McGlinchey Stafford Member Manuel Farach.

Bartram's Impact on Foreclosure Actions

Bartram's explicit approval of the right to seek foreclosure based on a new default despite there being a previously dismissed foreclosure action, should dispense the uncertainty that existed surrounding the impact of a dismissal on the acceleration of the loan balance. The Court specifically held that the dismissal simply placed the parties back in the same contractual relationship as before the dismissal, and the acceleration declared in the unsuccessful foreclosure action is revoked by reason of the dismissal. Thus, mortgagees may file suit for additional foreclosure actions, as long as they are based on a new default date that occurred within five years of filing the new foreclosure action.

Bartram's Impact on Consumer Debt Collection Actions

This opinion should also be particularly impactful in the consumer claims context where borrowers file Federal Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA) claims based on alleged debt collection activities after the dismissal of a foreclosure action. The typical claim involves a borrower, after obtaining a dismissal of a foreclosure action, receiving some type of communication from the mortgagee or its servicer, seeking payment for all past due amounts on the debt. The borrower's argument has been that any amounts past due beyond five years are barred by the statute of limitations, and thus are not valid debts. By sending communications seeking to collect those amounts, the mortgagee or servicer is violating the FDCPA and FCCPA by seeking to collect on a debt it should have known was barred by the statute of limitations and therefore not valid.

[16] McGlinchey Stafford, PLLC. *Bartram Decision Clarifies Statute of Limitations.* Jacksonville, FL: McGlinchey Stafford, PLLC, 2016. Mcglinchey.com. McGlinchey Stafford, PLLC, 4 Nov. 2016. Web. 13 Dec. 2016. <http://www.mcglinchey.com/files/Uploads/Documents/McGlinchey-Alert-FL-Supreme-Court-Bartram-Ruling-Nov-2016.pdf>.

> With the Court's holding in Bartram, this argument will be much more difficult. In applying its reasoning to the facts in Bartram, the Court stated that "**[o]nce there were future defaults, however, the Bank had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default**." Based on the Court's analysis, **the past due amounts being sought by the mortgagee or its servicer after the dismissal of a foreclosure action, including all amounts due beyond five years, would still be recoverable and would constitute a valid debt. Therefore, the mortgagee or servicer should not be liable for violating the FDCPA or FCCPA in seeking to collect the full amount due on the loan, because such amounts constitute a valid debt.**
>
> We are hopeful that as the full impact of the Bartram opinion begins to filter down through the trial courts, these types of consumer claims will become a thing of the past. Of course, there will always be individuals who will not accept the explicit holding of Bartram, and nonetheless continue to file claims as discussed above. With the Florida Supreme Court's opinion in Bartram, however, mortgagees and servicers now have a strong weapon in their arsenal to combat these claims.

MEDIA REACTION TO BARTRAM

Media reacted swiftly to the Bartram decision heralding it as an important decision. A story in the Tampa Bay Time contained a headline that read "High court ruling means no more 'free houses' for Florida homeowners in foreclosure" and went on to say, "there will be no 'free houses'' for Floridians who have defaulted on their mortgages but continue to live in their homes without paying. The story even quoted my friend and colleague, Matt Weidner a vocal champion for Florida homeowners. In the Tampa Bay Times story, they wrote:[17]

> In a major opinion, the Florida Supreme Court has ruled that lenders can resume foreclosing at any time, even if they have taken no action in years. Previously, they had to act within five years of when the borrower first defaulted.
>
> While a boon for banks, the ruling is a blow to thousands of delinquent borrowers who hoped that their cases would be permanently dismissed and that the banks could no longer collect on the outstanding mortgage debt.
>
> "This case resolves an important issue for Florida, one of the states hardest hit by the foreclosure crisis," said Michele Stocker, a Fort Lauderdale lawyer who represents lenders. "The decision effectively removes the unfair notion that people can live in a home for free after an extended period of time. It could help clear out the backlog of cases that have been sitting around for a while."
>
> By some estimates, a ruling in favor of borrowers and against lenders would have wiped out as much as $400 million in real estate-related debt obligations in Florida.
>
> "This ruling comes as no surprise," Stocker said. "Any other ruling would have created such havoc in Florida as it pertains to foreclosures and properties. I don't think the Florida Supreme Court would have wanted to dip its toe into that."
>
> Matt Weidner, a St. Petersburg lawyer who represents delinquent homeowners, agreed that the ruling was expected but said banks should have been more diligent in foreclosing.
>
> "Get used to living in a world where the banks always win," he said. "Even before this (ruling), you can't deny that the courts had a radical pro-business, pro-bank, pro-insurance company tilt. There was never any way the court was going to tell the banking industry they can't collect on billions of dollars' worth of loans."

[17] Martin, Susan Taylor. "*High Court Ruling Means No More 'free Houses' for Florida Homeowners in Foreclosure*." Tampa Bay Times. Tampa Bay Times, 11 Nov. 2016. Web. 13 Dec. 2016. <http://www.tampabay.com/news/business/realestate/high-court-ruling-means-no-more-free-houses-for-florida-homeowners-in/2302493>.

Interesting enough, the publication and website DSNews that stands for Default Servicing News went on to prove one of my points of contention and arguments contained in this report. Their headline read "State Spotlight: Florida's Supreme Court Ruling is a Win for Servicers!" They wrote:[18]

> The Florida Supreme Court recently ruled that ***servicers may file new foreclosure actions against borrowers*** who won foreclosure cases more than five years ago if the borrowers defaulted again within five years of the first case's dismissal. The case, Lewis Brooke Bartram v. U.S Bank National Association was decided in favor of the mortgage servicers as borrowers argued a five-year statute of limitations should apply.
>
> The court's ruling, authored by Justice Barbra Pariente, determined that when foreclosure actions are dismissed, ***servicers and borrowers return to their pre-foreclosure complaint status***. This allows homeowners to continue to pay back their loans in installments, rather than all at once.
>
> The ***ruling also gives back servicers' right to seek acceleration and foreclosure based on the mortgagor's subsequent defaults*** saying, "Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage."

Law360 ran a story under the headline "Banks Win Big In Fla. Supreme Court Foreclosure Ruling!" It went on to write:[19]

> The court's decision is the most important one in Florida affecting the mortgage industry in the last decade and was a "clean sweep victory for all banks and servicers" on the statute of limitations defense, according to Derek Leon of Leon Cosgrove LLC. "One of the primary, if not the most prevalent, defenses that has been raised in these lawsuits has been wiped out," he said. "**This is a grand slam victory for banks**."
>
> "When the Third District reversed themselves in April, I think that was a clear indication of where things were going," Michelle Stocker of Greenberg Traurig said. "I didn't think the Supreme Court was going to reverse itself on the point of law that was made in Singleton." Doing so would have wreaked havoc in Florida and ended a number of foreclosure suits, she says. But the decision now provides some much-needed clarity to the courts, which are still dealing with foreclosure litigation leftover from the mortgage crisis. **"I think it forces a lot of courts to get off the fence, because there are a number of pending suits where judges have held off on making rulings until the Supreme Court made its ruling,"** Stocker said. **"It may help to clear out some of the backlog of old cases that have been sitting around."**
>
> For Robert Brochin of Morgan Lewis & Bockius LLP, the court's decision was the best outcome that fairly strikes a balance between the rights of borrowers and the rights of lenders to obtain collateral to secure their loans. "A foreclosure suit is not suing for damages, it's suing for possession of the property," Brochin said. "**It's an *equitable proceeding*, which means that *courts use principles of fairness and equity***. Clearly the court had that thought in mind."
>
> But foreclosure defense attorney Peter Ticktin, who authored an amicus brief in the case, said the decision turns a blind eye to the fact that the deck is stacked against borrowers from the beginning by banks that recklessly issued mortgages to people they knew would never be able to repay the money. "I think that the court looked at it the way the judges originally were looking at things before they started realizing a lot of the wrongdoing of the banks," said Peter Ticktin of The Ticktin Law Group PA. "This is going to keep litigation going on for a long period of time where it would probably be pragmatically better to clean up our mess."

[18] Baer, Kendall. "State Spotlight: Florida's Supreme Court Ruling Is a Win for Servicers." DSNews. The Five Star Institute, 07 Nov. 2016. Web. 13 Dec. 2016. <http://www.dsnews.com/daily-dose/11-06-2016/state-spotlight-floridas-supreme-court-ruling-win-servicers>.
[19] Bolado, Carolina. "Banks Win Big In Fla. Supreme Court Foreclosure Ruling - Law360." Law360. Lexis Nexis, 7 Nov. 2016. Web. 13 Dec. 2016. <http://www.law360.com/articles/859665/banks-win-big-in-fla-supreme-court-foreclosure-ruling>.

CONSENSUS ANALYSIS – NO FREE HOUSES

In analyzing the decision, a consensus can be easily reached on a few of the significant points my colleagues, bank lawyers, the industry, and courts will take. As I have said for years, there are no free houses! Even if you win, its going to cost you to win and the banks can come back and foreclose again. The only way to win a free house, is to beat the servicers, not the foreclosing plaintiff, at their "game" and achieve a significant money judgment, jury award, or sanction. The illusion of free houses has misguided many in litigation, including some of my colleagues and I. Everyone knew this was a risk. Now, getting on to Bartram's significance.

First, a previously dismissed foreclosure case does not prevent suit on a separate and subsequent default made by the borrower. However, it is only the *mortgagee* who 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. Thus, identifying the mortgagee, not the Person Entitled to Enforce the Note (PETE) or even a note holder becomes paramount to the decision since UCC 9 comes into play.

Second, there is no requirement for any formal deceleration notice from the lender. It's automatic as of the date of the prior dismissal. A few Florida District Courts discussed and opined that a lender should be required to perform an overt act of deceleration in order to allow acceleration of a new default after dismissal. The Bartram Court held that, "the dismissal itself — for any reason — 'decelerates' the mortgage and restores the parties to their positions prior to the acceleration."

Third, the distinction between an involuntarily dismissal with or without prejudice doesn't affect the Court's analysis or its decision. If the prior mortgage foreclosure action was involuntarily dismissed pursuant to Rule 1.420(b), regardless of whether it was with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration that creates an automatic deceleration upon the date of the dismissal order.

Fourth, the automatic deceleration upon the date of the dismissal order thus automatically reinstates the mortgagor's right to continue to make *payments on the note* as well as the right of the *mortgagee*, to seek acceleration and foreclosure based on any subsequent defaults by the mortgagor. Thus, the actual default, amount of default, date of default will have to be carefully pled and answered. The deceleration opens the door for a borrower to make a monthly payment or two the day after the dismissal and they will not be in default, according to the Court's decision. This gives borrowers and foreclosure defense and consumer counsel some new wrinkles and additional weapons as I will explain later in this report.

Fifth, for each subsequent default, the statute of limitations will run from the date of each new alleged default providing the *mortgagee* the right, *but not the obligation*, to **accelerate all sums then due under the note and mortgage.** A careful analysis by lawyers, experts and judges must be analyzed to see which sums are due under the note (monthly payments, principal, interest, late fees and expenses in enforcement of note) and what is due under the mortgage (forced-placed insurance, taxes, inspection fees, BPOs etc.), for they are not one in the same. Since there is no obligation, a prior mortgagee or its agents who sat on such rights, my have waived their ability to collect and a defense of laches can be employed.

Sixth, after two years before the Florida Supreme Court, the court left a lot of open and remaining questions about what would constitute a subsequent default and what amounts a servicer could claim and obtain as well as what defenses a borrower may have against the servicers and foreclosing plaintiffs.

OPEN QUESTIONS

After reading the Bartram decision and many of the analyses by counsel for the lending and servicing industries, what is certainly known in addition to the consensus analysis is there are a plethora of issues to be litigated and problems for the banks and servicers to address. For example, an open question remains as to the statute of limitations applications to voluntarily dismissals and the distinction there. This issue is currently before the Florida Supreme Court in Bollettieri Resort Villas Condominium Association, Inc. v. Bank of New York Mellon. Thus, there is a risk that foreclosures that were voluntarily dismissed by the mortgagee may not be covered by the Court's holding in Bartram.

Next, while not a statue of limitations issue, the two-dismissal rule with foreclosure actions is an open question for second mortgage and lien holders. What is the effect of two voluntary and/or involuntary dismissals that alleged the same default and sought the same claim, against a second lien holder that is not the borrower and has no obligation on the note? Can a second lien holder be sued again to extinguish their lien?

The real critical issue is what amounts and claims are the actual mortgagees entitled to in a new foreclosure lawsuit? When do you start the default date? What amounts can and can't be included in the suit whether before or after five years? What happens to the interest rate in adjustable rate mortgages that adjusted during this time period?

However, the biggest issue I see, as will be further explained in my analyses, arguments, strategies and tactics is determining the lawful principal balance to be sued upon and accounting for it in the servicers' systems of record, especially Black Knight Financials MSP system used by over 50% of the industry that historically has be unreliable and unable to calculate such adjustments. How are subsequent payments by borrowers, immediately after deceleration, applied to a borrower's loan and what portions get attributable to the principal balances?

What issues lurk with payments by third-party co-obligors, insurers and others who have paid out claims to the servicers? What about advancing facilities? What about negative amortization loans? How will the MSP, LSAMS and other servicing systems be able to go in and account for new payments? Will they be placed in suspense/unapplied accounts? Will the principal balance be re-amortized? What is the effect of interest rate adjustments and which time period does the borrower pay? Does he pay the next alleged due date on the loan or the amount due for the very month of the dismissal order? Trust me my friends, the servicers' quants, accountants and lawyers are already drawing up their process schematics to figure this one out, and with new CFPB regulations along with consent orders in place, this won't be an easy process and as I write below, it's not the BIG WIN or BIG LOSS so many are writing about.

GLASS HALF EMPTY OR HALF FULL?

Foreclosure defense lawyers, advocates and borrowers, after being subjected to decades of legal abuse syndrome, see the Bartram decision as an empty glass of water rather than the half-filled glass of water it is. I view the decision as a full glass of water since I understand the opportunities and arguments this so-called "bad decision" can give us. In summary, the decision takes the "no free houses" mindset of many judges off the table and reverses the table. Where once, judges were reluctant to award a borrower a "free house" due to the open question regarding the statute of limitations in a foreclosure case, they can now summarily dismiss cases by telling sloppy or unscrupulous lawyers and servicers to get their cases straight and come back to court to foreclose when they get their facts, evidence, witnesses, and papers in order! This is a concept not lost on any judge, regardless of political or temperamental leanings.

It can now be argued that since the borrower will not get a free house, no one stands to lose by dismissing bad cases with bad facts, bad lawyering, bad evidence, and bad witnesses that don't pass the smell test. The judge, with proper evidence, facts, and expert witness supported testimony can tell those concealed hedge funds, mortgage insurers, advance receivables trusts, and private investors lurking in the background to show their faces and come to court with real facts, real evidence, and real witnesses so the judge can render real justice!

Good lawyers with good clients can then obtain good money judgments that payback their legal fees and the borrower's legal costs and expenses in exposing the abuses. Smart and good lawyers, will push their client's cases faster and move for their own summary judgments with the right affidavit from an expert and get the case decided on the facts. The stall and crawl game played by both servicers and borrowers can go by the wayside and real justice in real time can be administered by the courts.

You have to change the intentionally "programmed mindset" of judges in that there are no free houses for anyone, servicers included. You must show there is no such thing as a simple foreclosure in a modern mortgage transaction. If they were simple, the servicers and the true mortgagees could foreclose in a matter of weeks or months, not years. It's the processes, practices and systems of the default servicing industry that has caused these extraordinary abuses of the legal process as well as delay. You must place the responsibility for such actions where it rightfully belongs, on the servicers and those they serve who lurk in the background.

MY ANALYSIS OF MAJORITY OPINION

First, I agree with the consensus of opinions provided earlier and about no free houses. There are a number of opportunities I see in the Bartram decision and majority that are helpful to borrowers and their counsel and problematic to servicers and foreclosure counsel. Some of the law firms have addressed a few above, but let me provide some of my viewpoints based on my understanding, knowledge, experience and expertise.

Stop Industry "Talking Point Strategies" to Judges

First, foreclosure defense counsel needs to collectively and cohesively start battling and countering the improper psychological programming that servicers and their counsel exert upon overworked judges. No free houses was a carefully planned strategy employed by servicers and foreclosure counsel to overcome a perceived equity issue that the borrower shouldn't get a windfall for the acknowledged and well-known frauds and abuses committed by the servicers that resulted in hundreds of billions in civil and regulatory settlements.

As described in this report and other reports I have authored, no one can argue with my findings and facts about the unlawful predatory servicing practices servicers and foreclosure counsel engaged in. Fabrication of evidence, testimony and false pleadings still pervade the industry since the servicers and foreclosure counsel are still employing dirty tricks and fraud to conceal other and much bigger frauds. In Bartram, the Court touches on this in several ways that I will highlight for you directly below:

> **There have been many claims of unfair and predatory practices by banks and mortgage holders in the aftermath of the financial crisis that shook the country, *and in particular, Florida*.** See, e.g., Pino v. Bank of N.Y., 121 So. 3d 23, 27 (Fla. 2013) (**discussing allegations of fraudulent backdating of mortgage assignments**); see also In re Amends. to Fla. Rules of Civ. Pro.—Form 1.996, 51 So. 3d 1140 (Fla. 2010) (***noting the necessity for verification of ownership of the note or right to enforce the note in a foreclosure action because of "recent reports of alleged document fraud and forgery in mortgage foreclosure cases***"). Some of these claims have included allegations that mortgage holders have precipitously sought foreclosure even though the mortgagor missed only one or two payments and attempted to cure their defaults. **In this case, *quite the opposite is true*. Bartram raised *no defense* as to *the terms of the Mortgage and note itself*. His *sole claim* is that the Bank lost the right to seek foreclosure of the Mortgage based on distinct defaults that occurred subsequent to the dismissal of the initial foreclosure complaint.**

In essence, Bartram and his attorneys got a quick victory. I don't know what their complaint or pleadings read like, but issues like did the alleged foreclosing plaintiff have any right in the mortgage wasn't before the Court. Issues about the specific terms and provisions of either the note or mortgage weren't before the Court either. The Court didn't look at securitization fail or securitization fraud issues. They just simply said, there was a prior foreclosure and it's outside the statue of limitations. In essence, there wasn't a big fight, a big battle or large record before the Court. Bartram won on a summary judgment. Now, that still doesn't mean they can't raise those issues now and they've lost the decision, it just means the case goes back.

However, the Court in recognizing the issues surrounding fraudulent foreclosure practices provided borrowers and their counsel with some direction. Many borrowers and lawyers have not argued properly that there are two different actions and remedies occurring in a foreclosure action. You enforce and collect on a note, while you foreclose on a mortgage! As the Court and other courts they cite opine "foreclosure is an equitable remedy." Thus, borrowers and their counsel must adjust their thinking, strategies and tactics to focus on making the judge the final arbitrator in balancing the equities and look at the various equitable remedies available!

Equitable Remedies

Equitable remedies are distinguishable from "legal" remedies. Defense counsel must separately and distinctly analyze the choice of remedies by the servicer. Defenses, pleadings and arguments must take into account what exact legal remedies is a foreclosing plaintiff seeking versus the equitable relief they lay claim to. It is here, that you can get judges to exercise their equitable powers. For example, a judge can give a judgment on enforcement of the debt and grant a money judgment, but not give them an equitable judgment to foreclose. Or, the judge can find that the servicer or plaintiff has unnecessarily delayed the proceedings due to their dilatory tactics and not award them interest payments or say you can pay the defaults up to the time he believes they began obfuscating the proceedings.

Unclean Hands

Equitable principles can also limit the granting of equitable remedies. This includes "*he who comes to equity must come with clean hands*" (i.e. the court will not assist a claimant who is himself in the wrong or acting for improper motives).[20] Save for a few cases, I cannot think of an occasion where a foreclosing plaintiff has come to Court with clean hands. In fact, they come in with widely known dirty hands (pleadings), dirty feet (evidence), dirty tongues (testimony) and a load of dirty laundry (their entire past history). As such, exposing and attacking the servicers for issues related to evidence spoliation, witness tampering, fraud on the court, subornation of perjury and filing separate claims against the servicers themselves becomes paramount in light of the Bartram decision.

If the servicers are engaged in fabricating evidence in the forms of allonges, endorsements, and assignments or they are destroying and not preserving evidence, then an unclean hands defense or a possible third party spoliation of evidence claim may be brought against the servicers, trustees, and custodians. More focus needs to be paid attention to the document remediation and title cure measures many servicers are employing to turn unenforceable or less valuable collateral into enforceable and more valuable collateral. The equitable "remedy" of "unclean hands" may be available to borrowers whose collateral was "remediated" or "cured" with dirty hands.

Before Bartram, there was a mindset amongst certain borrowers that they perhaps could get a free house. This mindset has been dispelled. Thus, it can be argued to the Courts that due to the historical unlawful and abhorrent behavior, pattern and practices of the servicers, for which there is ample evidence, that each paragraph, sentence, averment, figure, fact, calculation in a pleading, affidavit, and business record must be challenged for its truthfulness, veracity, and accuracy. Real lawyering instead of template lawyering can help take-back our courtrooms and justice.

Arguing for quick discovery responses and putting the servicers' dirty feet to either a fire or cleansing them in a bath, is beneficial to the Court, beneficial to the borrower, beneficial to the taxpayers, beneficial to neighbors and even beneficial to the mortgagee, the real party in interest, whomever that may be. Bringing the dirty laundry from each borrower's loan to the open immediately, must be the tactic before you give them anymore time to fabricate more evidence and create a new story.

We know how much dirty laundry is in each servicer, trustee, originator, securitizer, and custodian's systems of record. In fact, we know how they "scrub" the files to remediate the issues. There is so much data related to a borrower's loan, note, and mortgage that no one lawyer would be able to evaluate and understand the implications. That is why the importance of experts in various fields, especially e-discovery, who understand exactly what data exists in each loan and where to obtain it, become critical to any foreclosure defense.

[20] "*Equitable Remedy*." Wikipedia. Wikimedia Foundation, n.d. Web. 14 Dec. 2016. <https://en.wikipedia.org/wiki/Equitable_remedy>.

Laches

Laches is another equitable remedy that will not be granted if the claimant has unduly delayed in seeking their remedy. For those servicers who created their own mess and then waited unduly to file suit, the Supreme Court may tell the servicers to go ahead and shoot again, but they didn't say borrowers could not shield themselves with a laches defense. This would be especially true of servicers transferring servicing to get away from the fraudulent foreclosure problems they created. Waiting a year, two, even three years or even longer to initiate foreclosure proceedings after you lost would make laches a good foreclosure defense.

This would be especially true if the loan is sold and the collateral changed, such an allonge or endorsement to another entity. The buyer would be buying a known defaulted loan and if their business model is to foreclose on defaulted and toxic loans, they'd have a duty to preserve all the evidence if they are contemplating litigation. One key here is that the most important limitation relating to equitable remedies is that an equitable remedy will not lie against a bona fide purchaser for value without notice. As such, when these distressed debt buyers purchase distressed or toxic debt for 20¢ to 40¢ on the dollar, they are doing so with notice of not a borrower's default, but any deficiencies found in the collateral file.

> Laches (/ˈlætʃɪz/, la-chəz, like "latches"; /ˈleɪtʃɪz/, lay-chəz; Law French: "remissness", "dilatoriness", from Old French laschesse) refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, in particular with regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim.[21]

Balancing the Equities

Balancing the equities has existed in the legal sphere since classical Greek times, when Plato wrote about the difficulty of balancing the law as set forth and a sense of fairness.[22] Thus, as it relates to Bartram, the defense of laches will be best suited for those who sat on their hands. I can assure you, that after such a delay, the availability of witnesses and evidence will be a great obstacle to the toxic debt buyers who most likely purchased the servicing rights and mortgages for great discounts. This also becomes an equitable issue.

[21] "*Laches (equity)*." Wikipedia. Wikimedia Foundation, n.d. Web. 14 Dec. 2016. <https://en.wikipedia.org/wiki/Laches_(equity)>.
[22] McMahon, Mary, and O. Wallace. "*In Law, What Is Balancing the Equities?*" WiseGEEK. Conjecture Corporation, n.d. Web. 14 Dec. 2016. <http://www.wisegeek.com/in-law-what-is-balancing-the-equities.htm#comments>.

MY ANALYSIS OF JUSTICE LEWIS' OPINION

The opportunity I see in the Bartram case is to focus on some of the particulars of Justice Lewis' opinions. Justice Lewis concurred with the result of the Bartram Court, but not in their opinion. He wrote a separate opinion that, while not changing the result, opens the door for aggressively advancing some of my opinions and strategies as it relates to evidence, testimony and the bad acts of servicers. I will provide excerpts of what I think are the pertinent points of his opinion below, followed by my analysis.

> Today's decision will only continue that expansion, which I *fear will come at the* ***cost of established Florida law and Floridians*** *who may struggle with both the costs of owning a home and* ***uncertain behavior by lenders***.

Justice Lewis appears concerned about the actions of servicers in Florida and the expansion of "established Florida law" that benefits the servicers and lenders over Floridians.

> Given the **procedural posture** of this matter and the ***relatively sparse record before this Court***, the decision today fails to address ***evidentiary concerns*** regarding *how to determine the manner in which a mortgage may be reinstated following the dismissal of a foreclosure action*, as well as ***whether a valid "subsequent and separate" default occurred to give rise to a new cause of action.***

Justice Lewis appears to have issues as to what is going to constitute a subsequent and separate default. Is it the same payment due if not paid; the payment after the prior default; the next monthly payment after dismissal; taxes or forced placed insurance not being paid; or any one of a number of perceived defaults. He also complains about the procedural posture and sparse record before the Court.

This is what occurs when anyone obtains summary judgment. Knowing what I know, it is a virtual impossibility, unless defense counsel lays down, that summary judgment can be issued in any foreclosure action. The processes and lack of real evidence employed by the servicer makes this a virtual impossibility without a properly prepared and supported affidavit by a competent and authorized records custodian or employee. He definitely is telegraphing that he'd like to see a better record.

> In this case, ***there is no evidence contained in the record*** before this Court to show whether the parties to a "de facto reinstatement" following the dismissal of the previous foreclosure action.

Justice Lewis again appears to be complaining about a lack of evidence. This is showing a pattern to his thinking.

> Parties, ***particularly those as sophisticated as the banks and other lenders that routinely engage in such litigation, should be required to present evidence that the mortgage was actually decelerated and reinstated***, *rather than require our courts to fill in the blank and* ***assume*** *that deceleration automatically occurred* upon dismissal of a previous foreclosure action.

Justice Lewis now makes his concerns about evidence obvious when he states he believes that sophisticated banks and lenders who routinely engage in foreclosure litigation should be able to present evidence from their systems and business records to validate their averments and the litigated issues before a court. I could not agree more with what he wrote.

> The ***majority opinion rewrites the parties' note and mortgage to create a reinstatement provision***—i.e., reinstating the installment nature of the note, as if acceleration never occurred, upon any dismissal of any lawsuit—that ***the parties did not include when drafting their documents***.

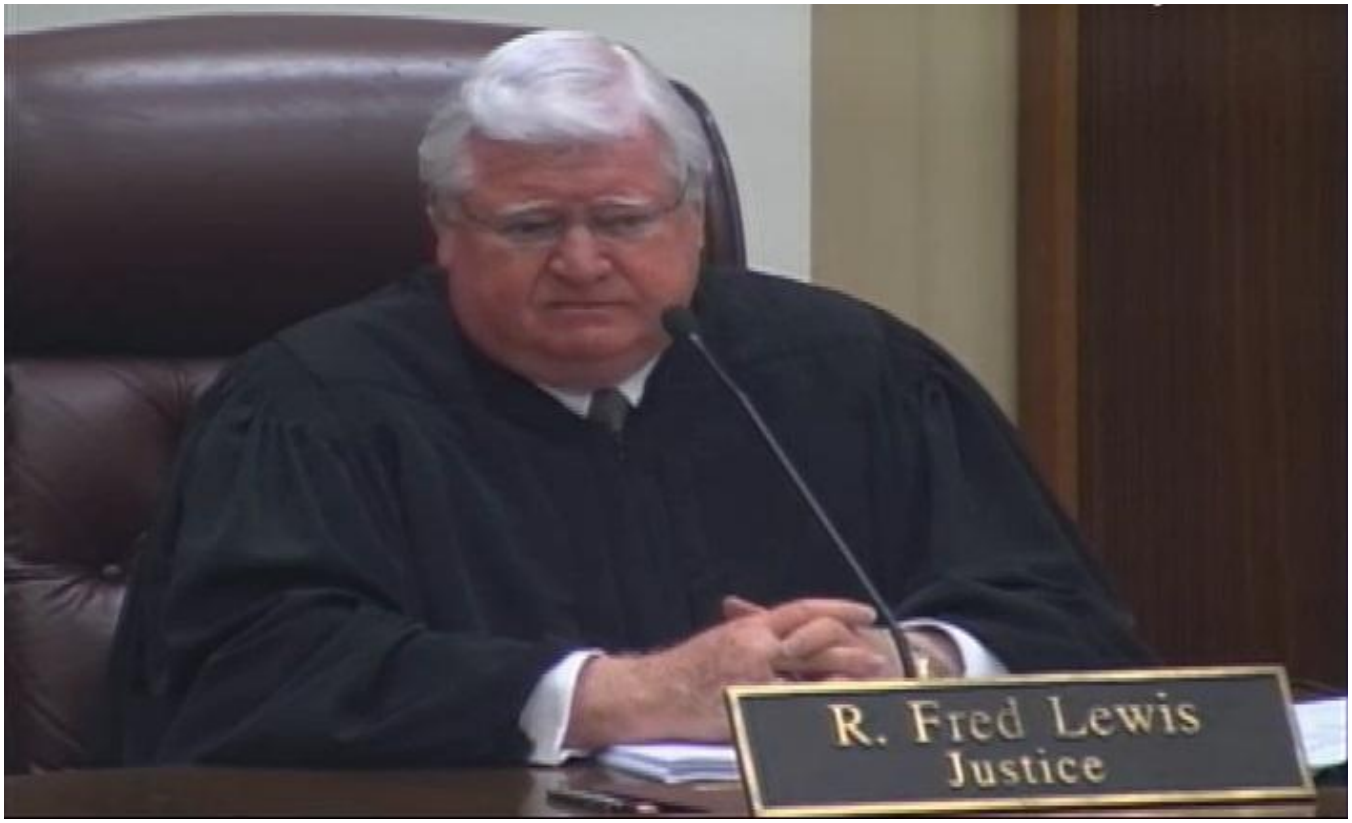
Justice Lewis takes exception that the Court had to go outside the four corners of the mortgage and note to achieve the desired result the bankers wanted. However, is he telegraphing what some of my colleagues and I are beginning to believe, that doing so and not being able to determine the amount due at a given point without court intervention makes the note a non-negotiable instrument under the UCC at its creation; at its original dishonor; or after a judgment in favor of the borrower?

The banking industry may have bit off more than they wanted to chew here. This would not result in a free house or the servicer not being able to foreclose. It would give them a higher bar of evidentiary proof that I believe is how they should be foreclosing in the first place by producing evidence of each transfer.

In light of the even more vague dismissal at issue in this case, I agree with Judge Scales' warning that "[w]e should be reluctant to hold that a trial court's **form dismissal order visits upon the borrower and lender a host of critical, yet unarticulated, adjudications that *fundamentally change the parties' contractual relationship* and are entirely unsupported by the existing law or by the record below.**"

Justice Lewis again seems to take exception with the record and changing the contractual relationship. Is it possible the Court fundamentally took away the ability to foreclose in their traditional fashion, having made findings and decisions that make the uniform promissory note a non-negotiable instrument?

What is unquestioned, is Justice Lewis wanted: 1) a better record to review; and 2) more substantial evidence from so-called *sophisticated lenders and servicers who are routinely filing foreclosure complaints* in Florida.



CONCLUSION

With the Bartram decision, Independent Foreclosure Reviews, National Mortgage Settlement consent orders, Baker & Hostetler Report, my prior reports and my or another expert's affidavit filed with the Court for judicial notice, you can now put forth a presentation to the judge and have visuals (both handout and visuals highly recommended) to present facts about your servicer's and the industry's historical unlawful behavior and make the following arguments to get the discovery, evidence and testimony you need to prove your case.

Look judge, this plaintiff's servicer has a history of lying and committing fraud before this Court and wasting taxpayer money; costing their shareholders and investors; and hurting our markets and communities. There's no free house for the borrower and no free ride for the servicer and those parties the servicer is concealing from this court.

Our experts have produced very specific and detail discovery requests in the forms of admissions, interrogatories, and requests for production. They have refused to produce the evidence we have diligently sought as has been their practice for three-decades in this court and our expert's experience. The evidence we seek would actually prove their case for them and if it was produced and proved their claims, it would be in bad faith and against my ethics to continue defending this case and prosecuting our claims. I would simply work out a consent agreement with counsel on how long my client can remain in the property before turning it over. Now, on the other hand, if they don't want to produce the very evidence that would prove their case for them, then Houston, we have a problem. You have to ask what are they hiding?

Virtually all the evidence we are requesting is electronic and must be kept and maintained by all the parties to this complex mortgage transaction due to regulatory issues. As such, if the CFPB or any other government regulator comes in and says we want to see this, they are able to produce it in a couple of days. They've entered into agreements and are bound by CFPB regulations to be able to produce this information and have the systems in place to comply with the law and various consent agreements parties related to this mortgage transaction must keep until seven years after the payoff of the borrower's loan.

These very highly sophisticated electronic systems contain data specific to my client's loan and property only and we know exactly what want based on our expert's requests and knowledge of the various systems of record employed by the each party related to this mortgage loan.

The information would take a few hours to extract and is easily available, retrievable, and accessible to the parties. In fact, my client will throw in $500 to assist with any cost. They have not shown any evidence of how the evidence we seek is privileged since there is no privilege log. We are not on any fishing expedition, we know exactly what specific records and data we are looking for that they can retrieve in moments. We've fished all of the oceans, lakes and streams in the world and brought the fish we need into one barrel. All we need for you to do if lift the lid and the fish will jump in our hands.

In fact, our expert can go into their systems on the Internet with the right passwords and retrieve the information we are seeking. In fact, they had a duty to preserve all of the data, information, and records we are requesting the moment they decided to call a default and threaten a legal action. Justices of the Florida Supreme Court in the recent Bartram decision in fact complained of the inability of sophisticated lenders and banks that routinely engage in foreclosure litigation should be required to present evidence that supports their averments and arguments. They also complained about the record in the case. We can't keep doing things the servicer's ways. We have to start doing it the right way.

If they don't produce judge, then we will simply file our own motion for summary judgment and make them produce a real affidavit in opposition supported with the evidence. If we lose, let's set this up for trial, exclude any witness or evidence they produce at the last minute and grant us an involuntary dismissal with or without prejudice and they can re-file when they get their act, evidence, pleadings, and witnesses together. Award our fees and maybe the next time, they will think twice about coming into Court with templated fill in the blank, one size fits all pleadings, evidence and even witnesses.

Let's move this and other cases off your docket; save you time; preserve our communities, save tax dollars and maybe they'll get the message and start practicing law the way it's supposed to be practiced and like we all took an oath to uphold. No one is getting a free house here, so let's start getting it right and maybe this historically corrupt industry will get it right too!