



Ruling Clarifies Statute of Limitations, Damages in Foreclosure Cases

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A state appellate court has ruled lenders can sue to foreclose more than five years after the first missed payment, but they can't collect damages for defaults falling outside the window provided in the statute of limitations.

The Jan. 12 decision in [Velden v. Nationstar Mortgage](#) came from Florida's Fifth District Court of Appeal, but has statewide implications on which foreclosures can survive defense motions to dismiss, and how much plaintiffs can collect if they miss the [statute of limitations](#) deadline. It's significant in a state where hundreds of thousands of foreclosures clogged court dockets after the last real estate market collapse.

A lender typically has five years after a borrower first defaults on a loan to sue for foreclosure. But the Velden decision shifted the starting line, finding a lender can foreclose if any of the missed payments—not just the first—falls within that window. In other words, each new default offers lenders a right to accelerate the loan, demand full repayment or foreclose.

Borrower counsel and plaintiff lawyers have long debated whether or not lenders could accelerate debt outside of the statute. Florida Supreme Court precedent, including *Bartram v. US Bank National Association*, favored lenders.

"Statute of limitations, res judicata and collateral estoppel are concepts that promote finality in litigation," said foreclosure defense attorney and Jacobs Keeley partner Bruce Jacobs who is not involved in the litigation. "The idea that a bank can file a foreclosure, lose and refile more than five years later should be problematic. You can't do that with a car accident case. You get one shot."

The new ruling from the district court did, however, offer one small win for borrowers: It limited damages by preventing lenders from collecting missed payments beyond the five-year timeline.

That part of the decision drew a special concurrence from Judge Brian D. Lambert, who agreed with the rest of the appellate panel but wanted to go further by keeping all missed payments in play.

If "I were writing on a clean slate, I would not exclude these sums from the judgment and would affirm the final judgment of foreclosure for the entire balance owed on the 30-year note at issue," Lambert wrote.

The decision stemmed from a July 2014 suit alleging borrower Neil Velden missed his Feb. 1, 2009, mortgage payments and "all subsequent payments"—the magic language that widens the window, according to attorneys. At trial, the court ruled in favor of plaintiff Nationstar Mortgage, awarding the full amount of the unpaid note plus interest, dating back to January 2009.

Mark P. Stopa, of the Stopa Law Firm in Tampa, represented Velden on appeal.

Akerman attorneys Nancy M. Wallace, William P. Heller, Celia C. Falzone and Eric M. Levine worked with Charles Gufford, of McCalla Raymer Leibert Pierce in Orlando, to represent the lender.

Velden appealed the trial outcome, arguing the lower court should have granted his motion to dismiss the suit. He claimed the deadline was in early 2014, and that the lender missed it by about five months.



But the appellate panel disagreed, holding that proof of any missed payment within five years of filing the complaint meant the statute of limitations did not bar the case.

"It's good that the [DCA] majority in *Velden* set a reasonable consequence for the bank sitting on its rights for so long," Jacobs said. "This leaves borrowers exposed to a lesser deficiency judgment after they lose their home. In a small way, that's a good thing."

Lambert's opinion nodded to a similar special concurrence by Florida Supreme Court Justice C. Alan Lawson, who pointed to an even wider window in [Bollettieri Resort Villas Condominium Association v. The Bank of New York Mellon](#).

"Justice Lawson addressed what he perceived to be 'a widespread and fundamental misunderstanding, in Florida, regarding how the statute of limitations ... operates vis-à-vis a long-term note (and mortgage),' " Lambert wrote. "Justice Lawson observed that when the right to accelerate the debt for nonpayment is optional with the holder of the note, the statute of limitations does not run until the note is due, which is 30 years after signing, unless the lender or holder accelerates and declares the full balance due earlier."