



## The Arizona Statute of Limitations Applicable to Collection Lawsuits and Non-Judicial Trustee's Foreclosure Sales of Real Property

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### Introduction

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The Great Recession caused a dire decline in both the Arizona real estate market and the financial position of many borrowers and guarantors. One effect was that, for years, many lenders elected not to pursue collection of eligible defaulted loans through:

- collection lawsuits based upon credit card agreements and promissory notes ("Collection Lawsuits"); and
- non-judicial trustee's foreclosure sales of real property based upon mortgage loan promissory notes and deeds of trust ("Foreclosure Sales").

As time has passed since the Great Recession, both the Arizona real estate market and the financial position of many previously distressed borrowers and guarantors have improved significantly. That has resulted in lenders making the decision to pursue Collection Lawsuits and Foreclosure Sales based upon loans that have been in payment default or fully matured for years.

Covid-19 is now causing even further delay of lenders exercising their collection rights and remedies concerning many defaulted loans, due to a new recession in Arizona and moratoriums imposed by the federal government against lenders conducting certain Foreclosure Sales.

Regardless of the reason for the lender's delay in collecting upon a dormant defaulted loan, borrowers and guarantors are quick to assert the affirmative defense of the Arizona statute of limitations as a bar against the lender pursuing the long-delayed Collection Lawsuit or Foreclosure Sale. Although many

of the Collection Lawsuits and Foreclosure Sales are, in fact, now time-barred by the Arizona statute of limitations, the analysis to determine whether, or not, the statute of limitations applies is complex.

To assist in making a decision concerning whether, or not, a Collection Lawsuit or Foreclosure Sale is barred by the statute of limitations, we have prepared the following list of frequently asked questions ("FAQs") that are often received by our firm. Our responses to the FAQs:

- are limited to an analysis of current Arizona law,
- do not take into account arguments that may be made with respect to tolling of the statute of limitations as a result of the federal Covid-19 moratoriums, or for other reasons, and
- are not intended to be a substitute for independent legal research and analysis when making the ultimate decision to pursue collection of a given defaulted loan.

### Frequently Asked Questions

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#### 1. **What is the Arizona statute of limitations that applies to collecting upon a defaulted promissory note or credit card agreement?**

*Short answer:* Six years.

The Arizona statute of limitations applicable to a lender's breach of contract cause of action based upon a defaulted promissory note or a credit card agreement is six years. A.R.S. § 12-548 sets forth said applicable six-year statute of limitations as follows:

12-548. Contract in writing for debt; six-year limitation; choice of law.

A. An action for debt shall be commenced and prosecuted *within six years after the cause of action accrues, and not afterward*, if the indebtedness is evidenced by or founded on either of the following:

1. A contract in writing that is executed in this state.
2. A credit card as defined in section 13-2101, paragraph 3, subdivision (a).

*(Emphasis added)*

## **2. Does the same six-year statute of limitations apply to a non-judicial trustee's Foreclosure Sale of real property?**

*Short answer:* Yes.

In February 2018, the Arizona Court of Appeals held that the six-year limitations period of A.R.S. § 12-548(A)(1) applies equally to bar a lawsuit to collect upon an unsecured promissory note and conducting a non-judicial Foreclosure Sale. *Andra R. Miller Designs LLC v. US Bank*, 244 Ariz. 265, 269, 418 P.3d 1038, 1042 (AZ Ct. App. 2018), *review denied* (July 3, 2018).

## **3. Can a lender collect upon a promissory note that matured six or more years ago?**

*Short answer:* No.

The statute of limitations applies to each matured/defaulted note installment payment separately as it becomes due under the note amortization schedule, and it does not begin to run on any installment until it is due. *Andra R. Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (App. 2018) *review denied* (July 3, 2018). See also, *Ancala Holdings L.L.C. v. Price*, 220 Fed. App. 569, 572 (9th Cir. 2007) (a cause of action "accrues" each time a party fails to perform as required by the contract) and *Ortiz v. Trinity Fin. Servs. LLC*, 98 F.Supp. 3d 1037, 1042 (D. Ariz. 2015) (*each time the debtor fails to make a payment when it becomes due, a separate breach occurs and a cause of action "accrues," starting the clock*).

Because the maturity date of a promissory note is the last scheduled installment payment of the debt

instrument, the cause of action for that final installment payment "accrues" on the loan maturity date. As a result, a lender cannot sue upon the promissory note six years or more after the scheduled maturity date.

EXAMPLE: Loan Maturity Date: 1/1/2015. Current Date: 1/2/2021. A Collection Lawsuit or Foreclosure Sale is barred, as more than six years have passed since the loan maturity date.

## **4. When does a cause of action "accrue" upon a defaulted credit card agreement loan for the purpose of calculating the six-year statute of limitation?**

*Short answer:* On the date of the first uncured missed payment upon the credit card loan.

The Arizona Supreme Court, in *Mertola v. Santos*, 244 Ariz. 488, 489, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1029 (2018) held that whether, or not, a credit card lender exercises an optional acceleration clause in a defaulted credit card agreement, the cause of action to collect the entire credit card balance due "accrues" as of the date of the first uncured missed payment.

EXAMPLE: Last Payment On Credit Card: 1/1/2015. Current Date: 1/2/2021. Collection Lawsuit based upon the credit card agreement is barred.

## **5. Are there different rules to determine when a cause of action "accrues" for the purpose of application of the six-year statute of limitations concerning a suit on an installment promissory note versus a credit card agreement?**

*Short answer:* Yes. They are discussed below.

**6. Application of the six-year statute of limitations to accelerated loans:**

**When does a cause of action “accrue” upon a defaulted un-matured installment promissory note for the purpose of calculating the six-year statute of limitation if the lender has taken an affirmative act to accelerate the loan?**

*Short answer:* The cause of action “accrues” on the date that the lender takes an affirmative act to exercise the option to accelerate the debt.

When a creditor has the power to accelerate an installment contract debt, the six-year statute of limitations begins to run on the date that the creditor takes an affirmative act to exercise the option to accelerate the debt. *Mertola v. Santos*, 244 Ariz. 488, 491, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1031 (2018) citing *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 495, 930 P.2d 1007, 1009 (AZ App. 1996) (“[I]f the acceleration clause in a debt payable in installments is optional, a cause of action as to future non-delinquent installments does not “accrue” until the creditor chooses to take advantage of the clause and accelerate the balance”). In addition, the creditor must undertake some affirmative act to make clear to the debtor that the debt has been accelerated. *Id.* See also, *Baseline Financial Services v. Madison*, 229 Ariz. 543, 544, 78 P.3d 321, 322 (AZ App. 2012) (“when an installment contract contains an optional acceleration clause, an action as to future installments does not “accrue” until the holder exercises the option to accelerate”).

EXAMPLE: Loan Date: 1/1/10. Loan Maturity Date: 1/1/40. Loan Acceleration Date: 1/1/21. A Collection Lawsuit or Foreclosure Sale may be initiated within six years after the acceleration date – until 1/1/27.

**7. Application of the six-year statute of limitations to loans that have not been accelerated:**

**When does a cause of action “accrue” upon a defaulted un-matured installment promissory note for the purpose of calculating the six-year statute of limitation if the lender has not taken an affirmative act to accelerate the loan?**

*Short answer:* The statute of limitations applies to each matured/defaulted Note installment payment separately as it becomes due under the Note amortization schedule, and does not begin to run on any installment until it is due.

If the creditor does not exercise the option to accelerate an installment contract debt and/or to determine the date of “accrual” of a cause of action upon a matured/defaulted monthly installment payment, the statute of limitations applies to each matured/defaulted Note installment payment separately as it becomes due under the Note amortization schedule, and does not begin to run on any installment until it is due. *Andra R. Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (App. 2018) *review denied* (July 3, 2018). See also, *Ancala Holdings L.L.C. v. Price*, 220 Fed. App. 569, 572 (9th Cir. 2007) (a cause of action “accrues” each time a party fails to perform as required by the contract) and *Ortiz v. Trinity Fin. Servs. LLC*, 98 F.Supp. 3d 1037, 1042 (D. Ariz. 2015) (each time the debtor fails to make a payment when it becomes due, a separate breach occurs and a cause of action “accrues,” starting the clock).

The rules discussed above concerning determining the date of “accrual” of a cause of action based upon a defaulted mortgage loan installment promissory note have been applied consistently by the Arizona Court of Appeals and the United States District Court for the District Of Arizona in the following line of cases: *Andra R. Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 418 P.3d 1038 (AZ App. 2018) *review denied* (July 3, 2018). *Baseline Financial Services v. Madison*, 229 Ariz. 543, 278 P.3d 321 (AZ App. 2012); *Navy Federal Credit Union v. Jones*, 187 Ariz. 493, 930 P.2d 1007 (AZ App. 1996); *Hummel v. Rushmore Loan Management LLC*,

2018 WL 3744858 (D. AZ 2018); and *Ortiz v. Trinity Financial Services LLC*, 98 F.Supp.3d 1037 (D. AZ. 2015). Furthermore, as was fully discussed above, the Arizona Supreme Court, in *Mertola, LLC v. Santos*, 244 Ariz. 488, 490, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1030 (2018) distinguished installment debt from credit card debt in the context of selecting the correct rules to determine when a cause of action “accrues” to calculate the six-year statute of limitation.

In February 2021, the Arizona Court of Appeals held that the same rules concerning determining the date of “accrual” of a cause of action also apply to a home equity line of credit loan with a defined maturity date. *Webster Bank NA v. Mutka*, 2021 WL 476056 (AZ App. 2021).

EXAMPLE #1: Loan Maturity Date: 1/1/21. Last Payment: 1/1/15. Current Date: 1/2/21. Both a Collection Lawsuit and a Foreclosure Sale are barred.

EXAMPLE #2: Loan Date: 1/1/10. Loan Maturity Date: 1/1/40. Loan is not accelerated. Last Payment Made: 1/1/15. Current Date: 1/2/21. The limitations period bars a suit on any payments due under the loan on 1/1/15 or earlier. The lender may, however, still commence a Collection Lawsuit or Foreclosure Sale based upon the installment payments due from 2/1/15 going forward.

**8. Do the same rules apply to determine when a cause of action “accrues” to pursue a non-judicial Foreclosure Sale of real property as apply to a matured or un-matured installment promissory note?**

*Short answer:* Yes.

See, *Andra R. Miller Designs LLC v. US Bank*, 244 Ariz. 265, 269, 418 P.3d 1038, 1042 (AZ Ct. App. 2018), review denied (July 3, 2018).

**9. What qualifies as an affirmative act to accelerate an un-matured installment promissory note?**

*Short answer:* Typically, sending a Notice of Acceleration or Demand Letter or recording a Notice of Trustee’s Sale that makes clear to the borrower that that the lender has accelerated the loan. In addition,

filing a judicial foreclosure complaint is an affirmative act of acceleration of a loan.

On January 14, 2021, the Arizona Court of Appeals held “that absent an express statement of acceleration in the notice of trustee’s sale, or other evidence of an intent to accelerate, recording a notice of trustee’s sale, by itself, does not accelerate a debt.” *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021). See also, *Baseline Financial Services v. Madison*, 229 Ariz. 543, 545, 275 P.3d 321, 323 (AZ App. 2012) (even if a contract permits acceleration of a loan without notice, the lender must perform an unequivocal act demonstrating it has exercised the loan acceleration clause); and *Andra Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (AZ App. 2018), review denied (July 3, 2018) (“to exercise its option to accelerate a debt, the creditor must undertake some affirmative act to make clear to the debtor it has acceleration the obligation”).

**10. Does recordation of a Notice of Trustee’s Sale by itself serve as an act to accelerate an un-matured installment promissory note?**

*Short answer:* No. The simple act of recording a Notice of Trustee’s Sale, by itself, is not an affirmative act to accelerate the loan. The loan must be accelerated in writing by a separate notice of acceleration or by including language in the Notice of Trustee’s Sale that the loan has been accelerated.

On January 14, 2021, the Arizona Court of Appeals held “that absent an express statement of acceleration in the notice of trustee’s sale, or other evidence of an intent to accelerate, recording a notice of trustee’s sale, by itself, does not accelerate a debt.” *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021).

**11. Can a lender de-accelerate a loan for the purpose of application of the statute of limitations?**

*Short answer:* Yes. The lender can de-accelerate a loan by stating in writing that acceleration of the debt is withdrawn or revoked.

See, *Andra Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 271, 418 P.3d 1038, 1044 (AZ App. 2018), *review denied* (July 3, 2018).

**12. Does the act of a lender internally “charging off” a loan have any implication concerning whether, or not, an installment loan evidenced by a promissory note has been accelerated for the purpose of calculating the statute of limitations?**

*Short answer:* No. “Charging-off” a loan is an internal bank accounting measure. It is not an affirmative act to exercise the optional acceleration clause of a loan.

See, *Baseline Financial Services v. Madison*, 229 Ariz. 543, 545, 275 P.3d 321, 323 (AZ App. 2012) (charge-off of a loan is an accounting procedure within the bank and not an affirmative exercise of the optional acceleration clause).

**13. What is the statute of limitations applicable to a defaulted contract for sale such as a retail installment contract for the sale of a motor vehicle?**

*Short answer:* Four years.

A.R.S. §47-2725(A) of the Arizona Uniform Commercial Code (“UCC”) imposes a four-year statute of limitations for suits based upon a defaulted contract for sale which typically concerns a retail installment contract for the sale of a motor vehicle. *Baseline Financial Services v. Madison*, 229 Ariz. 543, 544, 275 P.3d 321, 322 (AZ App. 2012).

Additionally, a lender’s repossession of a motor vehicle is an affirmative act sufficient to exercise the optional acceleration clause of a retail installment sales contract concerning the sale of a motor vehicle. *Id.* at 546 and 324 citing *Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508, 679 P.2d 529, 531 (AZ App. 1983).

**14. What is the statute of limitations that applies to a mortgage deficiency lawsuit following a lender’s non-judicial trustee’s foreclosure sale of real property?**

*Short answer:* 90 days.

A.R.S. §33-814(A) and (D) require that a creditor commence an action to recover a mortgage deficiency within ninety (90) days’ after the date of the non-judicial trustee’s foreclosure sale of the subject real property. Failure to file a deficiency lawsuit within the 90-day period results in the proceeds of sale, regardless of amount, being deemed to be full satisfaction of the obligation and no right to recover a deficiency in any action shall exist. Furthermore, this statute of limitation is a statute of repose, meaning that it is an absolute bar date against filing a mortgage deficiency lawsuit after the 90-day post-foreclosure sale period expires. *In re Wright*, 486 B.R. 491, 502 (Bankr. AZ 2012) citing *Resolution Trust Corporation v. Olson*, 768 F. Supp. 283 (D. Ariz. 1991).

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