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Bankruptcy. Foreclosure. Collection Litigation. Creditor's Rights Litigation.

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

OVERVIEW:

- Lenders' renewed focus on Collection Lawsuits and Foreclosure Sales
- Impact of Covid-19
- Borrower and guarantor defense: Arizona statute of limitations
- Lender FAQs
- Our responses:
 - Are based on our analysis of current Arizona law
 - Do not address the implications of Covid-19 moratoriums
 - Are not a substitute for independent legal research and analysis

FAQs

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, per A.R.S. § 12-548.
- 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).

FAQs

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).

FAQs

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. 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).
- *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.
- *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.

FAQs

4. When does a cause of action “accrue” on a defaulted credit card agreement loan for purposes of calculating the six-year statute of limitation?

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

- *Mertola v. Santos*, 244 Ariz. 488, 489, 796 Ariz. Adv. Rep. 16, 422 P.3d 1028, 1029 (2018)
- 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.

FAQs

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.

6. When does a cause of action “accrue” upon a defaulted unmatured 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.

- *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)
- Creditor must undertake some affirmative act to make clear to the debtor that the debt has been accelerated. >>>

- *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.”

7. When does a cause of action “accrue” upon a defaulted unmatured 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.**

- *Andra R. Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (App. 2018) >>>

Application of the six-year statute of limitations to loans that have not been accelerated

- *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.
- *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.
- *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)
- *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.

FAQs

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.

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

FAQs

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 the lender has accelerated the loan. In addition, filing a judicial foreclosure complaint is an affirmative act of acceleration of a loan.

- *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021)
 - Arizona Court of Appeals (January 14, 2021): “[A]bsent 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.” >>>

FAQs

- *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.
- *Andra Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 270, 418 P.3d 1038, 1043 (AZ App. 2018)
 - To exercise its option to accelerate a debt, the creditor must undertake some affirmative act to make clear to the debtor it has accelerated the obligation.

FAQs

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.

- *Bridges v. Nationstar Mortgage, L.L.C.*, 2021 WL 126562 (AZ App. 2021)
 - Arizona Court of Appeals (January 14, 2021): “[A]bsent 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.”

FAQs

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.

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

FAQs

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.**

- *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.

FAQs

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.

- 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.
 - A.R.S. § 47-2725(A)
 - *Baseline Financial Services v. Madison*, 229 Ariz. 543, 544, 275 P.3d 321, 322 (AZ App. 2012).
- 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.
 - *Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508, 679 P.2d 529, 531 (AZ App. 1983).

FAQs

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.
- 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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