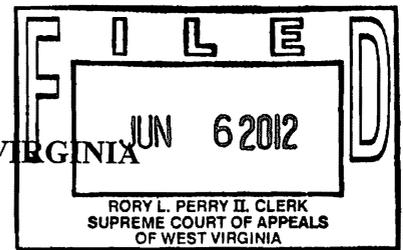


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0150



**Tribeca Lending Corporation,
Petitioner,**

v.

**(From the 13th Judicial Circuit
Case No. 11-C-2010
Judge Tod J. Kaufman, Presiding)**

**James E. McCormick,
Respondent.**

**PETITIONER'S REPLY IN SUPPORT OF ITS BRIEF TO CERTIFIED QUESTIONS
FROM THE 13TH JUDICIAL CIRCUIT OF WEST VIRGINIA**

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June 5, 2012

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Comes Now, Tribeca Lending, Inc. (“Petitioner”), by counsel, and files this reply in support of its brief.

I. BRIEF SUMMARY

Respondent, James E. McCormick, Defendant (“McCormick”) attempts to divert this Court’s attention from the actual certified questions by arguing the alleged factual merits of McCormick’s case. When making those arguments, McCormick conveniently ignores the fact that he has resided in the applicable house for five (5) plus years without making a payment and that said failure also includes not paying the property taxes or procuring insurance to protect the security.

Notwithstanding the above, Petitioner recognizes that anytime a borrower defaults on a loan resulting in a foreclosure sale such creates a traumatic event for the borrower as well as a substantial loss for the lender. In other words, it is a proverbial no win scenario for all parties. Despite those sometimes harsh realities, the lending system is dependent upon a lender’s ability to enforce the agreed upon terms and conditions of a contract, including the ability to foreclose. It further relies on the ability of a lender to convey real property with good and marketable title. This Court recognizes the importance of this system, and has noted such in several opinions. For example, this Court noted in Fayette County National Bank v. Lilly, 199 W.Va. 349, 357, 484 S.E.2d 232, 240 (1997) as follows:

We believe that the very foundation of our trustee foreclosure laws would be unsettled were we to allow grantors to challenge the value of real property at a deficiency judgment proceeding. What has formerly been a relatively quick and inexpensive proceeding, would turn into protracted and expensive litigation. The implications could negatively effect lending institutions from providing loans to its customers.

In a nutshell, McCormick is asking this Court to sanction a structure where no lender ever could convey good and marketable title post foreclosure. Moreover, this would have an impact on

lenders being able to provide loans to its customers. Specifically, McCormick asserts the following arguments that would preclude any lender from conveying good title post foreclosure:

- i. There is no statute of limitations for counterclaims;
- ii. Acceleration of the note has no bearing on the statute of limitations; and
- iii. W.Va. Code § 38-1-4a is limited to title claims.

II. ARGUMENTS

i. W.Va. Code § 46A-5-102 is Inapplicable in this Context.

W.Va. Code § 46A-5-102 provides that “[r]ights granted by this chapter may be asserted as a defense, setoff, or counterclaim to an action against a consumer without regard to any limitation of actions.” McCormick ignores that the underlying action in this matter is not an attempt to collect a balance due, nor is it an action to enforce a consumer loan agreement. In this case, the loan agreement was extinguished when the foreclosure sale occurred. Here, the underlying action is a wrongful possession action post foreclosure, i.e., trespass action. It definitely is not an attempt to collect a debt, nor is it an attempt to enforce the terms and conditions of the loan obligation.

By asserting that there is no statute of limitations for counterclaims under the West Virginia Consumer Credit Protection Act (“CCPA”), McCormick relies on the case of Chrysler Credit Corp. v. Copley, 189 W. Va. 90, 428 S.E.2d 313 (1993). However, McCormick intentionally ignores the key language in that decision where the Court acknowledged that “[e]ven though the Copleys could not sue Chrysler Motor Corporation for a ‘lemon law’ violation, they could under the CCPA, assert such defects as a defense to the suit.” Id. at 93. It further ignores that the Copley decision was limited to “a defense or setoff against Chrysler Credit Corporation to defeat its claim for further payment on the debt owed.” Id. at 94. The

Court also held that “where a consumer is sued for the balance due on a consumer transaction, any asserted defense, setoff, or counterclaim available under the CCPA may be asserted without regard to any limitation of actions under W.Va. Code § 46A-5-102 (1974). . .In this case, the Copleys had the right to assert the defective nature of the automobile as a setoff or a complete defense to the balance due.” *Id.*

Here, Tribeca never asserted a claim for a balance due relating to the loan agreement. Instead, as the purchaser of the foreclosed property, it sought possession of the property. Nothing in the underlying action falls under the CCPA—not an attempt to collect a consumer debt; or to enforce a consumer debt. Hence, it is not a **consumer action**, and therefore, W.Va. Code § 46A-5-102 is inapplicable.

Under McCormick’s theory, a defaulting consumer can continue to reside in the foreclosed property for an extended period of time. Basically, that defaulting party can wait for the purchaser of the property to seek possession of the property and simply file a counterclaim asserting a cause of action relating to the underlying debt which is what occurred here as McCormick has resided in the property for five (5) plus years after the foreclosure sale. McCormick’s interpretation of W.Va. Code § 46A-5-102 creates an absurd result which clearly was not the Legislature’s intended purpose.

ii. The Fourth Circuit Court of Appeals Held that the Statute of Limitations Commences When the Loan Was Accelerated.

As explained in Petitioner’s brief in support of the certified questions, this case partially comes down to the meaning of the phrase “last scheduled payment”. The Fourth Circuit Court of Appeals recently affirmed the decision of Delebreaux v. Bayview Loan Servicing, LLC, 770 F.Supp.2d 813 (4th Cir. May 2012) by holding as follows:

The language of this statute [46A-5-101(1)] is unambiguous because the phrase at issue, ‘the due date of the last scheduled payment of the agreement,’ plainly refers to the last date under the parties’ agreement providing for payment of a specified loan amount. In the present case, this date was June 5, 2007, the date set by Bayview in exercising its right of acceleration under the terms of the deed of trust.

Appeal No. 11-1139, p. 6, opinion attached hereto.

Unlike Delebreau, the foreclosure sale actually occurred and was finalized on January 8, 2008 when the Trustee’s Deed was recorded. Petitioner also accelerated the loan and commenced the foreclosure action in 2007. Similar to Delebreau, the applicable Deed of Trust provides, in particular part, that “upon acceleration all sums secured by this Security Instrument and accrued interest thereon shall at once become due and payable.” Accordingly, the statute of limitations began to run in 2007, the date the Loan was accelerated and all amounts became due and payable, and expired in 2008. This action was instituted on July 25, 2011, nearly three years after the statute of limitations had run.

McCormick further attempts to rely on this Court’s holding in Dunlap v. Friedman, 213 W.Va. 394, 399, 582 S.E.2d 841, 846 (2003) by arguing that the last scheduled payment is the last payment under the original terms of the loan agreement. In this case, that would make the last scheduled payment due on August 31, 2025—17 years after the foreclosure sale. Even without the foreclosure sale as well as the acceleration of the loan, a statute of limitations of thirty-one (31) years creates an absurd result. Actually, McCormick’s argument creates a scenario where the borrower could default on the very first month due and never make one single payment, and still have Thirty (30) plus years to challenge the foreclosure sale. In fact, any foreclosure conducted 25 or 30 years ago still would be deemed to have a last scheduled payment due and therefore, those borrowers could challenge the foreclosure sales as long as it was within 1 year of the last scheduled payment of the original loan term.

Of additional concern, lenders often work with borrowers through loss mitigation to assist them in avoiding a foreclosure sale. One of the prevalent loss mitigation programs is the Home Affordable Modification Program (“HAMP”). Under that program, a lender may be able to modify the term of the loan to forty (40) years. Again, pursuant to McCormick’s interpretation, the borrower now would have forty-one (41) years to file a lawsuit. This very well could create a whole generation’s worth of unclear title in the State – this potential cloud would extend to past, present, future lenders, borrowers, and title companies.

Petitioner respectfully requests that this Court re-examine whether the intended purpose of Dunlap was to create a situation where a consumer has thirty-one (31) years to file a lawsuit even if the alleged claims relate to the origination of the loan. Petitioner asserts that Dunlap created an unintended consequence which ignores the premise that “[t]he basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them.” Id. at 397 (citing Morgan v. Grace Hospital, Inc., 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965)).

iii. The Legislature Enacted West Virginia Code § 38-1-4a to Create a Time Bar for Borrowers to Challenge a Foreclosure Sale

McCormick argues that “creditors again have complete control over the application of the statute of limitations and could pave the way clear for indomitable unlawful detainer actions by simply waiting one year and a day after acceleration or foreclosure to file.” This position completely ignores all of the opportunities afforded the borrower to avoid a foreclosure sale. First, W.Va. Code § 38-1-3 requires the trustee to send notice to the borrower regarding the foreclosure sale. W.Va. Code § 46A-2-106 requires the lender to provide a borrower a right to cure which consistently is thirty (30) days before the lender is entitled to foreclosure. Further,

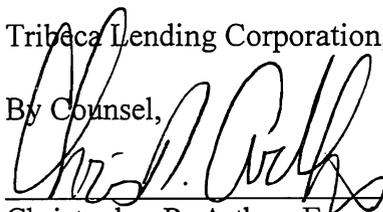
the borrower has the right to request an injunction to stop the foreclosure sale. Hence, there are various remedies prior to the foreclosure sale which protect the borrower. McCormick actually is arguing that a borrower should be protected from his or her own derelict behavior. Once the foreclosure occurs, there has to be a time period where the purchaser has good title. That time period clearly is defined by W.Va. Code § 38-1-4a—one year.

III. CONCLUSION

For all of the foregoing reasons, the decision of the 13th Judicial Circuit Court dismissing Respondent McCormick's claims in the underlying civil action as statutorily time barred by West Virginia Code § 38-1-4a and West Virginia Code § 46A-5-101(a) should be affirmed.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CATHY DELEBREAU; DAVID D.
DELEBREAU, individually and on
behalf of all others situated,

Plaintiffs-Appellants,

v.

BAYVIEW LOAN SERVICING, LLC,

Defendant-Appellee.

No. 11-1139

Appeal from the United States District Court
for the Southern District of West Virginia, at Parkersburg.
Joseph R. Goodwin, Chief District Judge.
(6:09-cv-00245)

Argued: January 24, 2012

Decided: May 31, 2012

Before GREGORY and KEENAN, Circuit Judges, and
Liam O'GRADY, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Keenan wrote the opin-
ion, in which Judge Gregory and Judge O'Grady joined.

COUNSEL

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Lynch, TROUTMAN SANDERS, LLP, Virginia Beach, Virginia, for Appellee. **ON BRIEF:** Bren J. Pomponio, MOUNTAIN STATE JUSTICE, Charleston, West Virginia, for Appellants. Jason E. Manning, TROUTMAN SANDERS, LLP, Virginia Beach, Virginia, for Appellee.

OPINION

BARBARA MILANO KEENAN, Circuit Judge:

In this purported class action on behalf of borrowers holding home mortgage loans serviced by Bayview Loan Servicing, LLC (Bayview), Cathy and David Delebreaux (the Delebreaux) claim that Bayview improperly added fees to borrowers' accounts in violation of the West Virginia Consumer Credit and Protection Act (the Consumer Credit Act), W. Va. Code §§ 46A-1-101 through 46A-8-102. Such claims brought under the Consumer Credit Act are subject to a one-year statute of limitations (the statute of limitations), which runs from the "due date of the last scheduled payment of the agreement" of the parties. W. Va. Code § 46A-5-101(1).

The sole issue before us is whether, under the statute of limitations, "the due date of the last scheduled payment of the agreement" was June 5, 2007, the loan acceleration date set by Bayview in accordance with the deed of trust declaring the entire loan amount due (the acceleration date), or June 1, 2030, the loan maturity date designated in the Delebreaux' loan documents. We conclude that the acceleration date was the operative date for purposes of applying the statute of limitations, because no further payments were scheduled after that date. Thus, we affirm the district court's judgment that the statute of limitations began to run from the acceleration date, and that, therefore, the Delebreaux' claims were time barred.

I.

The facts of this case are not in dispute. In December 1999, the Delebreaux refinanced a home mortgage with Option One

Mortgage Corporation (Option One). The Delebreaus executed a note payable to Option One in the amount of \$84,500, the principal loan amount, and a deed of trust securing the note on the property.

The deed of trust gave the lender the option to accelerate the Delebreaus' loan in the event of their default. The acceleration provision in the deed of trust (the acceleration clause) stated that:

If any installment under the Note or notes secured hereby is not paid when due, or if Borrower should be in default under any provision of this Security Instrument, or if Borrower is in default under any other deed of trust or other instrument secured by the Property, *all sums secured by this Security Instrument and accrued interest thereon shall at once become due and payable at the option of Lender without prior notice*, except as otherwise required by applicable law, and regardless of any prior forbearance. In such event, Lender, at its option, and subject to applicable law, may then or thereafter invoke the power of sale and/or any other remedies or take any other actions permitted by applicable law.

(Emphasis added.)

In March 2004, Bayview began servicing the Delebreaus' loan pursuant to an agreement with Option One. By this time, the Delebreaus already had made several "late payments" on the loan, and they continued making late payments over the next two years. As a result of these late payments, Bayview assessed certain fees and provided written notification to the Delebreaus that they were in breach of the loan agreement. Facing foreclosure in June 2006, the Delebreaus entered into a loan modification agreement with Bayview, which increased the principal balance of the loan and extended the loan maturity date to June 1, 2030.

By early 2007, the Delebreaus again fell behind in making their mortgage payments. In June 2007, Bayview sent the Delebreaus a letter advising them that they were in default, and exercising Bayview's right to accelerate the loan, effective June 5, 2007. Thus, in accordance with the terms of the parties' agreement, the full amount of the loan "at once bec[a]me due and payable." No additional payments were scheduled thereafter, and the Delebreaus did not repay the full amount of the loan.

On July 19, 2007, the date of the scheduled foreclosure sale, the Delebreaus filed a petition in bankruptcy and proposed repayment plan pursuant to 11 U.S.C. §§ 301, 1321. Bayview thereafter stopped foreclosure proceedings and filed a proof of claim in the bankruptcy court for the amount owed by the Delebreaus. The Delebreaus made some payments to the bankruptcy trustee under their bankruptcy plan, and those payments were credited to their loan with Bayview. However, in December 2009, the bankruptcy court dismissed the Delebreaus' petition after they ceased making payments under the plan.

On March 18, 2009, while their bankruptcy case was pending, the Delebreaus filed the present action on behalf of borrowers whose home mortgage loans were serviced by Bayview, alleging that Bayview improperly added fees to borrowers' accounts in violation of the Consumer Credit Act.¹ Bayview filed a motion for summary judgment, arguing that the Delebreaus' claims were barred by the statute of limitations. The district court agreed with Bayview, holding that the claims were time barred because the Delebreaus did not file the present action until March 18, 2009, more than one year after the acceleration date. The Delebreaus filed a timely notice of appeal from the district court's judgment.

¹Bayview has stayed foreclosure proceedings pending the outcome of this appeal.

II.

The Delebreaus contend that the district court erred in holding that, under the terms of the parties' agreement, the statute of limitations began to run from the acceleration date. According to the Delebreaus, "the due date of the last scheduled payment of the agreement," within the meaning of the statute of limitations, is not the acceleration date because acceleration occurs at the option of the lender and is not a "scheduled" date. The Delebreaus further contend that the acceleration date imposed by Bayview did not result in a "last scheduled payment" for purposes of the statute of limitations, because the Delebreaus had the right to reinstate the loan prior to foreclosure by curing the default and paying certain other expenses. Thus, the Delebreaus assert that "the due date of the last scheduled payment of the agreement" was the loan maturity date of June 1, 2030.

We review de novo the district court's award of summary judgment involving this two-part legal question of statutory and contract interpretation. *See Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004); *Singer v. Dungan*, 45 F.3d 823, 827 (4th Cir. 1995). We first observe that the ultimate purpose of a statute of limitations is to ensure that causes of action be brought within a reasonable period of time. *Perdue v. Hess*, 484 S.E.2d 182, 186 (W. Va. 1997). Like other such provisions, the statute of limitations before us reflects legislative purposes of encouraging promptness in the initiation of claims, and of avoiding stale claims, inconvenience, and fraud that may result from the untimely assertion of such claims. *See Davey v. Estate of Haggerty*, 637 S.E.2d 350, 355 (W. Va. 2006) (citing *Morgan v. Grace Hosp., Inc.*, 144 S.E.2d 156, 161 (W. Va. 1965)).

The task of determining the meaning of the statutory phrase, "the due date of the last scheduled payment of the agreement," begins with consideration of the question whether that statutory language is unambiguous. A statute is

unambiguous when its plain meaning answers an interpretive question. *Harper v. Jackson Hewitt, Inc.*, 706 S.E.2d 63, 72 (W. Va. 2010). In such cases, the statutory language is dispositive and further inquiry is foreclosed. *Id.* Thus, when the language of a statute is unambiguous, we must apply the plain meaning of the words that the legislature has employed. *State v. Elder*, 165 S.E.2d 108, 111 (W. Va. 1968).

Here, the statute of limitations governing the Delebreaus' claims provides, in relevant part:

With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after *the due date of the last scheduled payment of the agreement.*

W. Va. Code § 46A-5-101(1) (emphasis added). We conclude that the language of this statute is unambiguous because the phrase at issue, "the due date of the last scheduled payment of the agreement," plainly refers to the last date under the parties' agreement providing for payment of a specified loan amount.

In the present case, this date was June 5, 2007, the date set by Bayview in exercising its right of acceleration under the terms of the deed of trust. As stated above, the deed of trust provided that, upon acceleration, "*all sums* secured by this Security Instrument and accrued interest thereon *shall at once become due and payable.*" (Emphases added.) Because no additional payments were scheduled thereafter, the acceleration date became "the due date of the last scheduled payment of the agreement," within the intendment of the statute of limitations. Therefore, the original schedule of payments, which would have ended on June 1, 2030, no longer had any effect under the terms of the deed of trust.²

²As the district court noted, this conclusion is unaffected by the bankruptcy proceedings initiated by the Delebreaus, including the fact that they

The contrary position suggested by the Delebreaus, that the statute of limitations would begin to run only upon the loan maturity date, fails because it impermissibly ignores the terms of the deed of trust providing for loan acceleration. As the district court recognized, the limitations period under the Consumer Credit Act runs from "the due date of the last scheduled payment of the agreement," which encompasses not only the original payment schedule but the parties' entire agreement, including the acceleration clause. *See* W. Va. Code § 46A-1-102(2). Under the language of the parties' agreement, the event of acceleration materially altered the parties' original schedule of payments, allowing the lender to demand full payment of the loan amount upon the borrower's default. When Bayview exercised this right demanding full payment effective June 5, 2007, the entire loan amount was due irrespective of the original schedule of payments. As a result, the loan maturity date of June 1, 2030, was nullified for the duration of the Delebreaus' default.

We observe that this application of the statute of limitations also is consistent with the general legislative purposes underlying such statutes, namely, those of encouraging prompt initiation of claims and of avoiding the inconvenience and fraud that may result from the assertion of stale claims. *See Davey*, 637 S.E.2d at 355. Indeed, "the object of a statute of limitation" is to "keep[] stale litigation out of the courts." *Beach v.*

made payments for a time pursuant to their bankruptcy plan that were credited to their loan with Bayview. The Delebreaus failed to abide by the schedule of payments in their bankruptcy plan, and accordingly, their petition was dismissed. Therefore, we are not confronted with the issue of determining "the due date of the last scheduled payment of the agreement," in a situation in which the borrower is continuing to make timely payments, or has finished making payments under a completed bankruptcy plan. Nor are we confronted with the issue whether a payment made in a bankruptcy plan may constitute a "payment of the agreement," even when the bankruptcy plan is ultimately dismissed. This was not an issue raised before the district court.

Ocwen Fed. Bank, 523 U.S. 410, 415 (1998) (internal quotation marks omitted); *see also Tidewater Fin. Co. v. Williams*, 498 F.3d 249, 261 (4th Cir. 2007) (elimination of stale claims is the very purpose of statutes of limitations). By contrast, the Delebreaus' suggested interpretation implausibly would result in the claims expiring on June 1, 2031, more than two decades after the Delebreaus' default. And the fact that the Delebreaus initiated their claims years earlier does not strengthen their legal position, because that position relies on the loan maturity date, plus the one-year period afforded under the statute of limitations, as the claims' expiration date irrespective whether the claims were filed years earlier.³

III.

In conclusion, we hold that the district court correctly determined that the Delebreaus' claims were barred under the one-year period imposed by the statute of limitations, which began to run from the acceleration date set by Bayview in accordance with the terms of the deed of trust. Therefore, we affirm the district court's award of summary judgment to Bayview.

AFFIRMED

³In view of the plain language of the deed of trust and the statute of limitations, and the facts of this case, we conclude that the cases cited by the Delebreaus in which the borrower prepaid the loan before the maturity date, or the loan was canceled by agreement of the parties, are inapposite. *See Amason v. First State Bank of Lineville*, 369 So. 2d 547, 550 (Ala. 1979); *Wenning v. Jim Walter Homes, Inc.*, 464 F. Supp. 110, 113 (S.D. Ind. 1978).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0150

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(From the 13th Judicial Circuit
Case No. 11-C-2010
Judge Tod J. Kaufman, Presiding)

James E. McCormick,
Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certified that on the 5th day of June 2012, I caused the foregoing "*Petitioner's Reply Brief in Support of its Brief to Certified Questions from the 13th Judicial Circuit of West Virginia*" to be served on all counsel of record via regular U.S. Mail, postage prepaid, and addressed as follows:

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