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Dear Mr. Gonski:

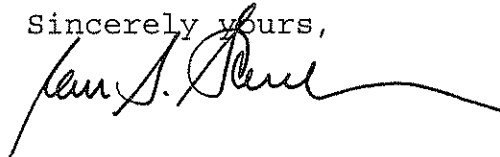
It is my pleasure to enclose a reprint of your article, "Legal Fictions and Mortgage Foreclosures," which was published in the Law Journal's "In Practice" column in this week's issue.

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Sincerely yours,



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IN PRACTICE

REAL ESTATE LAW

By DENNIS M. GONSKI

Legal Fictions and Mortgage Foreclosures

N.J.S.A. 2A:14-4 is arguably the only place to look for a mortgage foreclosure time bar

Many New Jersey lawyers are surprised to learn that the Legislature has never created a *per se* statute of limitations pertaining to mortgage foreclosures. Primarily due to the need to stabilize land titles, case law developed a limitation on mortgage enforcement by borrowing from adverse possession statutes.

The case law limitation upon mortgages comes from an analogy to the statutory time limitations enacted to extinguish “rights of re-entry” to real property — today, N.J.S.A. 2A:14-6 and N.J.S.A. 2A:14-7.

From time to time, legal scholars have criticized a mortgage limitation based upon adverse possession statutes. Such criticism became prophetic however, in 2001, when the Supreme Court struck down those same statutes as no longer being good law.

With the demise of the borrowed adverse possession statutes, what now is the limitation for mortgage enforcement?

Law vs. Equity

New Jersey permits two independent remedies for mortgage debt collection. A creditor can, in theory, bring an action: (1) at law upon his debt instru-

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ment (the note), as a contract by the obligor to pay the debt; or (2) upon the mortgage, as a contract by the obligor permitting the resort to realty as security for the debt.

So long as a debt remains unpaid — and, subject to laws enacted to protect residential property owners — one debt can enjoy two limitations: a legal statute of limitations (applicable to the note); and a separate limitation for the mortgage contract measured in equity by a

The imposition of a shorter time bar for mortgages would bring New Jersey in line with other jurisdictions.

much less predictable application of equitable principles.

The traditional explanation for allowing two limitation periods falls upon the former distinction between law and equity. A debt contract was one

enforceable at law and a mortgage contract was one enforceable in equity. Law imposed a statute of limitations — N.J.S.A. 2A:14-4, which provides 16 years if a contract is under seal and six years if a contract is not under seal. Equity, of course, proceeds at its own pace, determined by equitable principles.

The distinction between courts of law and courts of equity is however, long behind us. So why has the distinction between a debt contract and its security contract continued to survive? Why indeed do we still have two *separate* time limitations for the enforcement of what can only be viewed as *one* debt?

Analogy to Adverse Possession

The time bar to mortgage enforcement developed because of a recognized need to stabilize land titles.

Absent any statutory law, the equity courts borrowed and applied the limitation period created by certain adverse possession statutes. The concept was that a mortgagor who failed to make required mortgage payments was in adverse possession of the mortgaged property, since by his failing to pay he was in effect denying the mortgagee’s theoretical claim of ownership and right to possession.

The statutes seized upon to create a

"mortgage bar claim" were those originally enacted to bar a right of re-entry to real property, which today are:

2A:14-6. 20 years; right of entry into real estate:

Every person having any right or title of entry into real estate shall make such entry within 20 years next after the accrual of such right or title of entry, or be barred therefrom thereafter; and

2A:14-7. 20 years; real actions:

Every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued.

Because the courts that established the adverse possession analogy were high courts of last resort, *stare decisis* required subsequent judicial adherence, which has lasted for more than a century. Indeed, the weighty considerations of precedent that underlie *stare decisis* literally compel lower courts to follow the application of adverse possession to mortgage enforcement, no matter how objectionable they may perceive it to be.

Misinterpreted Statutes

The *stare decisis* promotion of N.J.S.A. 2A:14-6 and -7 continued to endure so long as the statutes themselves endured. However, in 2001, the Supreme Court struck down the two statutes.

In *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493 (2001), the Court not only ruled that N.J.S.A. 2A:14-6 and -7 are no longer good law, but it further stated that past generations of judges who relied upon these statutes misinterpreted the statutory law in that these same two statutes had been legislatively superceded in 1948 by the enactment of the forerunner of N.J.S.A. 2A:35-1, L. 1948, c. 373, entitled "An Act concerning civil actions for possession of land, superceding actions of ejectment."

Since 1948, the courts who have enforced the limitation imposed by N.J.S.A. 2A:14-6 and -7 have done so illegally and in violation of law.

The effect of *J & M Land* was therefore more than merely an upset of adverse possession law. It also brought an abrupt end to the *stare decisis* application of the now outlawed statutes to manage enforcement claims. When the Court struck down N.J.S.A. 2A:14-6 and -7, it also struck down the use of these two statutes as a measure for a mortgage bar claim.

There have been criticisms made over the years that New Jersey's time limitation for mortgage foreclosures is too long. As noted in 30A N.J. Prac., *Weinstein Law of Mortgages*, §32.8 p. 242 (West Group 2000):

[T]he legislature might enact a statute of limitations expressly applicable to mortgage foreclosures and clearly eliminate any requirement of "adverse possession." *Such a statute, hopefully, would provide for a period much shorter than the 20-year period of limitations* now applicable to foreclosure actions. (Emphasis supplied).

The imposition of a shorter time bar for mortgages would bring New Jersey in line with other jurisdictions such as New York, which favor a more timely resolution to land title issues. Indeed, New York generally permits only six years for mortgage foreclosures. In England the period is 12 years.

Contract Statute of Limitations

Because of *J & M Land*, a welcome opportunity has presented itself to reduce the limitation placed on mortgage enforcement to lesser time limits.

Because N.J.S.A. 2A:14-6 and -7 are now gone, the seemingly obvious replacement is to simply apply the general contract statute of limitations to all aspects of contractual debt — save, of course, those contracts governed by the Uniform Commercial Code.

N.J.S.A. 2A:14-4 provides an alternative six- or 16-year limitation:

Every action at law ... upon an obligation under seal conditioned for the payment of money ... shall be commenced

within 16 years next after the cause of any such action shall have accrued. ... This section shall also not apply to any action founded upon an instrument under seal brought by a merchant or bank, finance company, or other financial institution. Any such action shall be commenced within 6 years next after the cause of any such action shall have accrued.

Because N.J.S.A. 2A:14-4 is a contract statute of limitations, it is easily applied to contract debt collection; it is certainly more applicable to debt enforcement than were the former ejectment statutes.

Indeed, New Jersey courts routinely apply the general rules of tolling and partial payment to notes and mortgages alike. Why not simply apply a contract limitation across the board to both the debt contract and the security contract, and thereby unify all aspects of judicial debt enforcement?

The concept of applying a contract statute of limitations to mortgages is not without precedent. In earlier times, it was applied to the enforcement of the former "chattel mortgage."

With the merger of law and equity under the Constitution of 1947, the traditional fiction that separated a mortgage from its debt instrument is an unnecessary remnant. A debt instrument is a contract agreeing to pay a debt. A mortgage instrument is a contract, pertaining to that *same* debt. The earlier distinctions between equity and law need no longer compete for the enforcement of what is a single debt in today's financial market place.

So too, thanks to the Court's decision in *J & M Land*, the legal fiction that analogized mortgages to ejectment statutes no longer exists.

What remains good law is the statute of limitations the Legislature created for debt collection, N.J.S.A. 2A:14-4. Indeed, N.J.S.A. 2A:14-4 is arguably the only statute to now apply; it speaks directly to the entire debt transaction. It is in this statute that a mortgage foreclosure time bar must now be found. ■