

PUBLICATION

Avoiding a Limitations Fight by Rescinding Acceleration

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Texas recently added a new statute aimed at providing lienholders and loan servicers an unambiguous method for unilaterally abandoning the acceleration of a loan's maturity.

When a borrower defaults in paying an installment loan and the lienholder proceeds to foreclose, the maturity of the entire debt must be accelerated. Under Texas law, after a debt has been accelerated, the foreclosure must occur within four years of the acceleration. Failure to foreclose within four years after acceleration results in the voiding of both the lien and the power of sale to enforce the lien, forever barring foreclosure.

Although four years is typically sufficient time to foreclose, sometimes loss mitigation efforts (including compliance with federally-mandated programs), changes in servicers or protracted litigation with borrowers make foreclosure within the time limit difficult for lienholders. Texas has long provided statutory authority for borrowers to suspend the running of the statute of limitations through a written extension agreement, but there has previously been no statute permitting lienholders to suspend the running of the statute of limitations or to unilaterally abandon an acceleration. Lienholders and their servicers have argued they have the right to unilaterally rescind the acceleration under Texas' common law (it is the lender's unilateral, contractual option to accelerate the loan in the first place). Although several Texas courts have found lienholders may unilaterally rescind acceleration, lawsuits arising out of a lienholder's unilateral rescission often involve fact-intensive disputes about whether the lienholder's actions were sufficient to rescind the acceleration, resulting in expensive litigation with limited guidance from case law.

The new statute, Texas Civil Practice and Remedies Code § 16.038, became effective upon its passage in June 2015 and provides much-needed clarity for lienholders. To rescind an acceleration in accordance with the new statute, the lienholder, servicer or an attorney for the lienholder or servicer must give each borrower obligated on the debt written notice. Mirroring the provisions for notices of public sale in Texas Property Code § 51.002, the written notice must be served by first class or certified mail, and the notice is complete when deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. If a lienholder rescinds the previous acceleration by taking the steps outlined in the statute, the foreclosure claim is extinguished, and the running of the four-year statute of limitations period terminates. The new statute expressly provides that this procedure is not the exclusive method for rescinding an acceleration, but it does confirm the lienholder's right to rescind unilaterally and offer a straightforward process for rescission, which should aid lienholders in avoiding limitations challenges and resolving resultant litigation more quickly.