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Statutes of limitations and notices of default: Ung v Koehler, 2005

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Time within which to exercise power of sale is governed by 10-year and 60-year limits of CC §882.020; filing notice of default stating promissory note's final maturity date does not disentitle beneficiary to longer time limit.

Ung v Koehler (2005) 135 CA4th 186, 37 CR3d 311

In 1991, Ung gave Koehler a promissory note secured by a deed of trust on real property. The note matured in December 1992. The recorded deed of trust did not attach a copy of the promissory note or otherwise indicate its maturity date. In 2004, Koehler recorded a notice of default (NOD) against the property in anticipation of a nonjudicial foreclosure sale. The notice indicated the final maturity date. Ung successfully sued to enjoin the sale, contending that the time for exercising the power of sale had expired.

The court of appeal reversed. The lien created by the right of judicial foreclosure under the deed of trust was extinguished under CC §2911 on the expiration of the four-year limitations period applicable to the underlying note. However, as to nonjudicial foreclosure, CC §882.020 imposes a time limit on the exercise of the power of sale in a deed of trust of either 10 or 60 years from the "final maturity date" of the underlying debt. The court of appeal held that the §882.020 time limits are not overridden by §882.030, which provides in pertinent part:

Expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to this chapter or any other statute renders the lien unenforceable by any means commenced or asserted thereafter . . . .

The court rejected Ung's argument that the expiration of the lien under §2911 renders a deed of trust "unenforceable by any means commenced or asserted thereafter," thus precluding nonjudicial enforcement as well. The "lien" created by a deed of trust, as that term is used in §2911, includes only the security interest, not the power of sale. Accordingly, §822.030 must be construed as making unenforceable only the right of judicial enforcement, the only interest that is extinguished by §2911. Subsequent language in §882.030, stating that the §2911 extinction is equivalent to documents creating a discharge of a "security interest," not a discharge of the instrument creating the security interest, is to the same effect. Moreover, even if §822.030 were ambiguous, Ung's interpretation failed because its practical effect would be to replace the longer time limits expressly established by §882.020 with a four-year limit, thereby reducing that section to virtual surplusage, a result which the legislature was unlikely to have intended.

The court also ruled that Koehler's power of sale was subject to the 60-year limit of §822.020(a)(2) rather than the 10-year limit of §822.020(a)(1). The 10-year limit applies "if the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the record." Construing the term "record" to include any document recorded with respect to a property, including the instant NOD recorded more than 11 years after the maturity date, would lead to an absurd result not intended by the legislature. The NOD that must be recorded prior to exercising a power of sale (CC §2924) may be insufficient if it does

not state the final maturity date. The argument that every beneficiary who is otherwise entitled to 60 years, but fails to seek nonjudicial enforcement within 10 years, will be entitled to the remaining years only until the required NOD is filed, creates a classic "Catch-22" that statutes should be construed to avoid. The court held that an NOD under §2924 recorded more than 10 years after the last date fixed for payment of the debt or performance of the obligation does not constitute a part of the record for purposes of §882.020(a).

THE EDITOR'S TAKE: The two holdings of this opinion make perfectly good common sense, but also demonstrate how difficult it can be to make straightforward propositions with enough clarity as to disarm all the nitpickers looking for ways to get around them.

The first holding—that the 10- and 60-year limitations periods for conducting trustee sales under deeds of trust are not four years—is easy enough to understand. The problem is that there has never been any real reason for saying that mortgages and deeds of trust must be judicially foreclosed within four years of a default, whereas the power of sale in a deed of trust can be exercised long after that date (unless the power is in a mortgage rather than a deed of trust). The four-year foreclosure rule came from our CC §2911, which was probably miscopied from statutes elsewhere in the first place; and, in the second place, probably should apply—from a policy point of view—whether the foreclosure sale is judicial or nonjudicial, and should not depend on whether the underlying instrument is a mortgage rather than a deed of trust. (All of which omits the additional complicating consideration that the basic time period is six, rather than four, years because the note was negotiable, under Com C §3118.)

Because powers of sale in deeds of trust never outlaw, the legislature came to the aid of title searchers in our Marketable Record Title Act (CC §§882.020–887.090) by providing for the ultimate elimination of these rights after 10 or 60 years, sparing them from having to report all of those ancient loan documents as exceptions in their title reports. Since it would be practically impossible to have a title clearing period with a different duration from an enforcement period, the one has to control the other. So, if title searchers can ignore deeds of trust that are too old under the Marketable Record Title Act, creditors holding those instruments must, by parity, be prohibited at the same time from enforcing them. The language used by the legislature to say this was not perfect, but the point is clear: A creditor cannot enforce a power of sale clause in a deed of trust more than 10 or 60 years after its "final maturity date," while—conversely—it can enforce the clause before then, even if four years have already passed.

The second holding—that a date does not become "ascertainable from the record" merely because it is included in the notice of default (NOD)—is also perfectly sensible. There is no reason to require creditors to both carefully tailor their NODs so that they are effective as notice and, at the same time, not inadvertently trigger a wrong time period, since no one would be benefited by all that effort. The reason for the distinction between 10 and 60 is to make title searching sensible: It sets the point in time past at which an abstractor can conclude that an old instrument need no longer generate concern. That makes sense for original deeds of trust, which often leave all due dates for incorporation in their

companion—and unrecorded—promissory notes, but I have never heard of anyone worrying whether a 59-year-old unperfected NOD was still around. Maybe there should be a time limit on how long NODs can be effective, but treating them the same as deeds of trust just isn't the way to do it.—*Roger Bernhardt*