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DECELERATION: SLOWING DOWN TO DETERMINE AN ACCELERATED LOAN'S POST DISMISSAL STATUS

Stephanie Schneider*

INTRODUCTION

The autopsy report for the American Financial Crisis of 2007-2008 is lengthy, and, while examiners may disagree on the specifics, there is widespread agreement that the cause of death was a sudden and dramatic drop in the price of American houses.¹ This precipitous drop, cataclysmic “pop,” was in part driven by the market correcting itself following years of home value appreciation. However, the effect of the correction was magnified by subprime lending practices that allowed borrowers without verified sources of income to obtain loans.² Ultimately, this fallout coalesced into a dramatic increase in defaults on mortgage payments and a corresponding increase in foreclosure actions by creditors. For instance: pre-housing crisis, between the years 2000 and 2006, the national average foreclosure rate was about 0.6% or 6 out of every 1000 homes.³ Following the crisis, the national average foreclosure rate peaked at 3.6% or 36 out of every 1000 homes – a six-fold increase.⁴

But not every foreclosure action ends with the bank repossessing the mortgaged property. Rather, borrowers and lenders often find solutions that result in happier outcomes,⁵ or more frustratingly, face procedural issues that prevent an action from moving forward. Consequently, for any number of reasons, a foreclosure action may be dismissed months or years after it was first initiated. This paper explores what happens to a loan after a dismissal by addressing a difficult and widespread procedural question that has arisen from the post-Financial Crisis uptick

* University of New Mexico School of Law, Class of 2019. I would like to thank my family Fritz, Anna, Jeffrey, Kurt and Brianna for the love, laughter and encouragement that made it possible to complete this Comment.

1. Steven L. Schwarcz, *Understanding the Subprime Financial Crisis*, 60 S. C. L. REV. 549, 551 (2009) (stating, “financial crisis resulted from a cascade of failures, initially triggered by the historically unanticipated depth of the fall in housing prices.”).

2. *Id.* at 549-550 (“Lenders made mortgage loans available to even risky borrowers . . . making of mortgage loans in many cases without documentation of borrower income.”).

3. Molly Boesel, *Most Delinquency Measures Now Below Levels From Before the Housing Crisis*, CORELOGIC (Oct. 19, 2018), <https://www.corelogic.com/blog/2018/10/most-delinquency-measures-now-below-levels-from-before-the-housing-crisis.aspx>.

4. Ben Lane, *Corelogic: Foreclosures fall to lowest level since 2007*, HOUSEINGWIRE, (Jan. 12, 2016) <https://www.housingwire.com/articles/36008-corelogic-foreclosures-fall-to-lowest-level-since-2007>.

5. Such solutions include reinstatement of the loan, loan modification, payment plans, or bankruptcy. Short Sale Specialists: 8 Alternatives to Foreclosure, http://www.yourhome123.com/articles/ShortSales_S12_AlternativeProsAndCons.htm (last visited September 14, 2018).

in mortgage foreclosure litigation and dismissals of foreclosure actions. Specifically, what is the status of a New Mexico mortgage loan after a foreclosure action has been dismissed, and can a lender sue the borrower again for default?

STATUTORY CONSIDERATIONS

As may be evident, given the existence of this paper, New Mexico does not have a controlling statute governing an accelerated⁶ loan's post-dismissal status. However, statutory law plays a critical role in answering the question of whether a loan's acceleration can be undone – “decelerated”⁷ - via existing statutes of limitations. The controlling statute of limitations for bringing a foreclosure action dictates whether a case may be brought following a period dictated by law.⁸ New Mexico has two separate statutes relating to limitation periods for bringing an action on a promissory note or mortgage contract.⁹ Each statute prescribes a statutory period of six years.¹⁰ However, they diverge in relation to when the clock commences.

The first statute, Section 37-1-3(A), exists under New Mexico's Limitation of Actions Chapter.¹¹ Pursuant to it, a claim becomes time-barred six years after a cause of action is *created*.¹² In a foreclosure context, a cause of action would be a default to the terms of the mortgage, specifically, a missed mortgage payment. Thus, under the language of Section 37-1-3(A) a claim to recover on a missed mortgage payment would become time barred six years after the mortgage payment was missed. Alternatively, under the second statute, Section 55-3-118, which exists under New Mexico's UCC Chapter, a claim becomes time barred within six years of either (1) the due date or dates stated in the note, or (2) acceleration of the note.¹³ Thus, Section 55-3-118 looks to the promissory note's language and the lender's actions, rather than each instance of default.

6. A loan is accelerated when a lender demands immediate repayment of the entire loan balance in response to a default of the loan's contractual terms. Acceleration transforms a loan from a long-term installment contract with a monthly payment plan to a loan whose entire remaining principal balance is immediately due. If the borrower does not immediately pay the entire principal balance of an accelerated mortgage loan, then the lender may foreclose upon the mortgage loan, recovering up to the entire loan value from the proceeds of the judicial foreclosure sale. See Andrew J. Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 88-OCT FLA. B.J. 30 (2014).

7. *Id.* at 31 (“Deceleration is the act of undoing a mortgage note's acceleration and the accrual of the limitations period to return the lending arrangement to status quo ante – an installment agreement maturing in the distant future.”).

8. *Statute of Limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).”).

9. N.M. Stat. Ann. § 37-1-3 (Notes; written instruments; period of limitation; computation of period); N.M. Stat. Ann. § 55-3-118 (Statute of limitations).

10. N.M. Stat. Ann. § 37-1-3; N.M. Stat. Ann. § 55-3-118.

11. N.M. Stat. Ann. § 37-1-3 (“Actions founded upon any bond, promissory note, bill of exchange or other contract in writing shall be brought within six years.”).

12. *Id.*

13. N.M. Stat. Ann. § 55-3-118 (“an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.”).

As this paper examines the effect a foreclosure action's dismissal has on a loan's acceleration status, Section 55-3-119 is the more relevant limitation statute in this discussion as it uses acceleration as the basis to "start the clock," but does not clarify whether this clock may be paused or reset. This is significant as a lender must know whether the clock continues to run following the dismissal of the foreclosure action that started it. If it does continue, the lender has six years from the date the first foreclosure was filed until the claim is time-barred. Alternatively, if dismissal is viewed as rescinding acceleration and returning the loan to the status quo, dismissal would reset or pause the acceleration clock. Under the latter scenario, the statute of limitations clock would not begin to run again until a new acceleration commenced, or the loan reached maturity.¹⁴

The question of whether acceleration is rescinded following a dismissal is currently relevant as it arises as a delayed effect of the financial crisis. Following the crash of the housing market, lenders, foreclosure attorneys and the judicial system were struck with a swell in mortgage loan defaults that needed to be addressed.¹⁵ However, lenders and the judicial system were procedurally unequipped to deal with these rising defaults.¹⁶ In jurisdictions requiring judicial foreclosure, like New Mexico, courts faced overcrowded dockets due to the onslaught of foreclosure filings.¹⁷ Consequently, innumerable cases were involuntarily dismissed for judicial efficiency.¹⁸ Further, lenders found their records were often incompetent – with inadequate documentation of mortgage ownership.¹⁹ These record deficiencies subsequently effected litigation, as many attorneys negligently, ignorantly, or fraudulently pursued foreclosure actions on properties where they could not establish standing.²⁰ In order for a plaintiff bank to establish their right to foreclose they must prove, "(1) the homeowner has signed both the note (the underlying loan) and the mortgage assigning to the house as collateral for the note; (2) the bank owns the note and the mortgage; (3) the homeowner still owes a debt to the bank; (4) the homeowner is behind in the debt; and (5) the bank has accelerated that remaining debt in accordance with the terms of the note itself."²¹ If a plaintiff cannot establish these elements, they have not proved their right to foreclose, and the court is required to rule in favor of the homeowner.²² The bank's inadequate record-keeping, and subsequent filings on these records resulted in courts being hit with a surge of defenses from borrowers regarding the second element of foreclosure – that the banks did not own the note and mortgage.²³ Too often, these claims had merit, as some sampling indicates a ten-fold increase in "proof-of-ownership" issues since the

14. Recall that under Section 55-3-118 the statute of limitations may also begin to run from the due dates stated on the note. These due dates equate to "maturity" of the loan.

15. Bernhard, *supra* note 6 at 31.

16. *Id.*

17. *Id.*

18. *Id.*

19. Megan Wachspress, Jessie Agatstein & Christian Mott, *In Defense of "Free Houses"*, 125 YALE L.J. 1115, 1119 (2016).

20. *Id.* at 1120.

21. *Id.* at 1117.

22. *Id.*

23. *Id.*

financial crisis.²⁴ To remediate these issues, a plaintiff bank would dismiss its claim in order to obtain the proper documentation to pursue a new action.²⁵ However, in some instances the refiling would take years, blowing past the limitation periods imposed by statute.²⁶ This calls into question the third element of the foreclosure process: does the homeowner still owe a debt to the bank?²⁷

Lenders hope so. The alternative would be a time bar on the sought debt, and a “free house” for the defendant borrower.²⁸ However, in New Mexico, it is currently a question without an answer as the procedure for deceleration is problematically ambiguous. Unlike acceleration, terms for deceleration are not explicitly outlined in mortgage contracts. However, mortgages contain some provisions that may help inform an answer to the question.

CONTRACTUAL CONSIDERATIONS

A mortgage, or deed of trust,²⁹ is a written instrument often created in conjunction with a residential home loan.³⁰ This home loan evidences a lender’s promise to provide funds for a borrower, and is documented in a promissory note.³¹ In turn, a borrower will provide the lender with an interest in the real property they intend to purchase with the loan funds.³² This transfer of interest from the borrower to the lender is documented in a mortgage.³³ Together, the note and mortgage allow a lender to obtain title to the mortgage’s subject property if the borrower fails to repay the loan obligation.³⁴

Most often, a mortgage requires a borrower to make monthly payments to pay down the debt evidenced in the promissory note.³⁵ A failure to make payment results in a breach – a default to the terms of the mortgage. This system of repayment equates to an installment contract.³⁶ In an installment contract, payments are due

24. *Id.* at 1117 (“Litigation over ‘proof-of-ownership’ issues in foreclosures is a growing nationwide problem; sampling suggests a ten-fold increase between the periods immediately preceding and following the 2007 collapse of the housing market.”).

25. Bernhard, *supra* note 6 at 31.

26. *Id.*

27. Wachspress et al., *supra* note 19, at 1117.

28. *Id.* at 1121.

29. Mortgages are different than deeds of trust but the distinction is insignificant in this context.

30. Bernhard, *supra* note 6, at 31 (“Mortgages . . . are property liens securing the payment of debt, memorialized in a promissory note.”).

31. *Id.*

32. *Mortgage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.”).

33. *Id.*

34. Bernhard, *supra* note 6 at 31 (“Thus, at its simplest, a mortgage foreclosure is an action in breach of a promissory note, requesting judicial sale of property secured by the note through the mortgage.”)

35. *Id.* (“Modern notes and mortgages are most often installment contracts, whereby a new payment is due each month until the note and mortgage reach a maturity date.”).

36. *Id.*

periodically and each missed payment is a separate breach in the contract.³⁷ Theoretically, a lender could sue for each missed payment until the loan reached maturity.³⁸ However, as many mortgages bear 30-year maturity dates a lender would need to bear the cost and inconvenience of 30 years of perpetual litigation if they sued for each missed payment.³⁹ To circumvent this legal nightmare, lenders have opted to include acceleration clauses in their mortgage contracts. A standard acceleration clause provides, in whole or in part:

Lender shall give *notice* to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding and sale of the property. The notice shall further inform Borrower of the right to *reinstatement* after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. *If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand* and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies including but not limited to, reasonable attorney fees and costs of title evidence.⁴⁰

Notice three significant provisions of these terms: First, that the acceleration clause requires the lender to provide notice to the borrower not only of the default, but also of (1) the action required to cure the default, (2) a deadline for doing so, and (3) notice to the Borrower that failure to cure the default will result in acceleration of the loan. Second, that failure to cure a default may result in a lender demanding full repayment of all the sums secured by the Mortgage – thereby transforming the loan from an installment contract to a lump sum payment due on demand. Third, that the loan may be reinstated even after foreclosure proceedings have commenced. Also note, that though provided for under acceleration, reinstatement is generally detailed more specifically under a separate clause in the contract. A standard reinstatement provision provides in whole or in part:

37. *Id.* (“Unlike causes of action that entirely accrue on a single date, separate claims accrue on a mortgage contract for each period in which the borrower fails to make a payment, creating a separate five-year limitations period for each unpaid installment.”).

38. Under this system, the statute of limitation under N.M. Stat. Ann. § 37-1-3 would seem more applicable. Lenders would have six years from each default to collect on that missed payment.

39. Bernhard, *supra* note 6, at 31-32.

40. Lloyd Segal, STOP FORECLOSURE NOW 34 (AMACOM Am. Mgmt. Ass'n ed., 2007).

Borrower's right to reinstate after acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of the Security Instrument discontinued at any time prior to the earliest of (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate or; (c) entry of judgment enforcing this Security Instrument. These conditions are that Borrower: (a) pays lender all sums which would be due under the Security Instrument and the Note as if no acceleration occurred; (b) cures any default of any covenant or agreements (c) pays all expenses incurred in enforcing this Security Instrument, including but not limited to reasonable attorney's fees, property inspection any valuation fees and other fees incurred for the purpose of protecting lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the property and rights under this Security Instrument and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms as selected by the lender; (a) cash (b) money order (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity or (d) Electronic Funds transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured thereby shall remain fully effective as if no acceleration had occurred.⁴¹

Therefore, while acceleration calls all amounts owed due, the mortgage contract also provides that a borrower may, at any time preceding judicial sale, reinstate the loan by providing the funds necessary to bring the loan current. If a borrower does bring a loan current through reinstatement of the loan, the loan will be returned to its pre-foreclosure status, as if acceleration had never occurred.

While these contractual terms provide guidance for an answer, because deceleration is not explicitly detailed within the contract, the contract falls short of answering the ultimate question of what an accelerated loan's status is after the dismissal of a foreclosure action.

COMMON LAW CONSIDERATIONS

While New Mexico courts have not ruled on deceleration, courts in other jurisdictions have established case law on the status of a loan following dismissal. Although these holdings are not uniform, they may be split into three broad categories – automatic deceleration, affirmative act deceleration and the free home theory.

41. *Id.* at 49.

Automatic Deceleration

The case for automatic deceleration is most clearly exemplified by Florida case law.⁴² Florida is uniquely suited as a source for foreclosure case law because following the crash of the mortgage market, the sunshine state was essentially ground zero for foreclosure filings. During the peak moments of nationwide foreclosure filings, Florida's foreclosure rates reached new heights. Specifically, while the national average foreclosure rate was 3.6 percent or 36 out of every 1000 homes, Florida had an average foreclosure rate of 12.5 percent or 125 out of every 1000 homes.⁴³ Further, within Florida's already higher-than-national-average statistical point were even greater home losses, as some counties reported that 19.2 percent or 192 out of every 1000 homes were being foreclosed.⁴⁴ Due to the sheer volume of foreclosures, Florida has a body of case law on the subject where New Mexico has none.

For instance, *U.S. Bank v. Bartram*, Florida's landmark case on the issue of acceleration, presented to Florida's Supreme Court a certified question from Florida's Fifth District Court of Appeals as a "a matter of great public importance," namely:

[d]oes acceleration of payments due under a residential note and mortgage with a reinstatement provision in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida rules of civil procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on payment defaults occurring subsequent to dismissal of the first foreclosure suit?⁴⁵

After granting review, Florida's Supreme Court ultimately upheld the district court's decision, ruling that the plaintiff bank's attempted prior acceleration through a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations or bar future foreclosure actions based on separate defaults.⁴⁶ Florida's Supreme Court reasoned that following the prior acceleration, the loan had been decelerated because deceleration of a loan occurs automatically if (1) a new and separate default occurs after the dismissal of the first case (2) the subsequent case is filed within five years (the statute of limitations period in Florida) of the alleged default, and (3) the mortgage contract to be foreclosed contains a reinstatement provision.⁴⁷ These three circumstances are discussed as elements, whereby if one or

42. *Bartram v. U.S. Bank Nat. Ass'n*, 211 So. 3d 1009, 1013 (Fla. 2016), *reh'g denied sub nom.* *Bartram v. U.S. Bank Nat'l Ass'n*, No. SC14-1265, 2017 WL 1020467 (Fla. Mar. 16, 2017).

43. Molly Boesel, *Foreclosure Report Highlights: 10-Year Retrospect of the US Residential Foreclosure Crises*, CORELOGIC (Mar. 14, 2017) <https://www.corelogic.com/blog/2017/03/foreclosure-report-highlights-10-year-retrospect-of-the-us-residential-foreclosure-crisis.aspx>.

44. *Id.*

45. *Bartram v. U.S. Bank Nat. Ass'n*, 211 So. 3d 1009, 1012 (Fla. 2016).

46. *Id.*

47. *Id.* See also David Rodstein, *No Free House: Bartram v. U.S. Bank*, RODSTEIN LAW (Jun. 27, 2017), <http://rodsteinlaw.com/no-free-house-bartram-v-u-s-bank-published-in-action-line/>.

more of the elements are missing, the court could determine that the loan was not decelerated.⁴⁸

In reaching their conclusion, the court relied on their prior reasoning in *Singleton v. Greymar Association*, that a “subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent action.”⁴⁹ Recall that prior to acceleration, the lending agreement is an installment contract with payments due monthly. As new payments are due monthly, new defaults can occur monthly, as a new default may arise from each missed payment. Therefore, “[w]hile a foreclosure action with an acceleration of the debt may bar a subsequent action based on the *same* default, it does not bar subsequent actions and acceleration based upon different events of *default*.”⁵⁰ These different events of default would be subject to a new application of the statute of limitations, and thus a new claim would not be time barred as the clock would have started anew.

However, this reasoning is only applicable if dismissal returns a loan to its pre-acceleration status. For, while accelerated, there are no monthly payments that could result in default, and consequently, no opportunities for the statute of limitations clock anew. In *Bartram*, the court did find that new and separate defaults occur as the court provided that a dismissal does return a loan to its pre-accelerated status, stating:

[w]hen a mortgagee’s foreclosure action is involuntarily dismissed . . . either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor’s right to continue to make payments on the note and the right of the mortgagee to seek acceleration and foreclosure based on the mortgagor’s subsequent defaults. Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage.⁵¹

In other words, the *Bartram* court found that when a foreclosure action is dismissed acceleration is undone – “decelerated” – and, as such, the mortgage returns to its pre-acceleration status as an installment contract with borrowers again permitted to make monthly installment payments.⁵²

This holding seems contrary to the doctrine of res judicata, an “affirmative defense barring the same parties from litigating a second lawsuit on the same claim,

48. See Rodstein, *supra* note 47.

49. *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004).

50. *Evergrene Partners, Inc. v. Citibank N.A.*, 143 So. 3d 954, 955 (Fla. Dist. Ct. App. 2014) (emphasis added) (citing *Singleton v. Greymar Assocs.*, 882S So. 2d 1004, 1008 (Fla. 2004) (holding that “doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit.”)).

51. *Bartram v. U.S. Bank Nat. Ass’n*, 211 So. 3d 1009, 1013 (Fla. 2016), *reh’g denied sub nom.* *Bartram v. U.S. Bank Nat’l Ass’n*, No. SC14-1265, 2017 WL 1020467 (Fla. Mar. 16, 2017).

52. *Id.* at 1012 (stating “dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage.”).

or any other claim arising from the same transaction or series of transactions.”⁵³ The *Bartram* court answers this concern by again citing to *Singleton v. Greymar Assocs.*, which found that because foreclosure is an equitable remedy, “[t]he ends of justice require that the doctrine of res judicata not be applied so strictly as to prevent mortgagees from being able to challenge multiple defaults on a mortgage.”⁵⁴ The *Bartram* court reasons that for purposes of equity the court found that, “if the mortgagee’s foreclosure action is *unsuccessful for whatever reason*, the mortgagee still has the right to file subsequent foreclosure actions – and to seek acceleration of the entire debt – so long as they are based on *separate defaults*.”⁵⁵ This reasoning thus circumvents issues of res judicata, as each separate default would be a new cause of action, subject to a new foreclosure filing.

However, the *Bartram* court does not merely ground the reasoning for automatic deceleration in principles of equity. Rather, they reason that it is the appropriate decision given the mortgage’s reinstatement clause. Like the reinstatement clause presented previously,⁵⁶ the case’s subject reinstatement clause contained a provision whose “express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due *as if no acceleration had occurred*.”⁵⁷ Additionally, this right to reinstatement continued until “entry of a judgment enforcing this Security Instrument,” as long as Bartram “pa[id] the Lender all sums which then would be due under this Security Instrument and Note as if no acceleration had occurred.”⁵⁸ The court reasoned that this contractual provision, allowing the borrower to reinstate, dictated that “despite acceleration of the balance due and the filing of an action to foreclosure, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of ‘deceleration’ or otherwise.”⁵⁹ This is important as the court finds, based on contract law, that “the lender’s right to accelerate is subject to the borrower’s continuing right to cure.”⁶⁰ As discussed, the right to cure continues until a final judgment, so “[i]n the absence of a final judgment in favor of the mortgagee, the mortgagor still had the right under . . . the reinstatement provision, to cure the default and to continue making monthly installment payments.”⁶¹ As a dismissal is

53. *Res Judicata*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit.”).

54. *Bartram v. U.S. Bank Nat. Ass’n*, 211 SO. 3d 1009, 1017 (citing *Singleton v. Greymar Assocs.*, 840 So. 2d 356, 356 (Fla. 4th DCA 2003)).

55. *Id.* at 1019 (quoting *Dorta v. Wilmington Tr. Nat. Ass’n*, No. 5:13-CV-185-OC-10PRL, 2014 WL 1152917, at *1 (M.D. Fla. Mar. 24, 2014), *aff’d sub nom. Dorta v. Citibank Nat’l Ass’n for Lehman Bros.-BNC Mortg. Loan Tr.* 2007-3, 707 F. App’x 660 (11th Cir. 2017)).

56. *See Segal*, *supra* note 41.

57. *Bartram*, 211 SO. 3d 1009, 1020.

58. *Id.* (quoting from *Bartram*’s mortgage contract. Note that the mortgage contract contains other terms regarding the timing and conditions of reinstatement, but these other terms are irrelevant to this discussion).

59. *Id.* at 1018 (quoting *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938, 947 (Fla. 3d DCA 2016)).

60. *Id.* at 1018.

61. *Id.* at 1021.

not a final judgement, the court reasons that following the dismissal of a foreclosure action, this right to make monthly payments continues automatically and there is no action necessary to reinstate the loan via a notice of deceleration or otherwise.⁶²

In summation, Florida's Supreme Court in *U.S. Bank v. Bartram*, establishes that a loan is automatically decelerated following the involuntary dismissal of a foreclosure action.⁶³ This is based upon the court's application of *Singleton*, the court's interpretation of the acceleration and reinstatement clauses of the contract, and their conclusion that given these elements, the statute of limitations would not time-bar a future action derived from a new and separate default.⁶⁴

However, while *Bartram* addressed the question it was requested to answer, it did not cure all the ambiguity of the deceleration process.⁶⁵ For instance, *Bartram* involves an involuntary dismissal, but does not discuss whether their holding extends to voluntary dismissals.⁶⁶ Florida Supreme Court's subsequent acceptance of *Bollettieri Resort Villas Condo Ass'n v. Bank of New York Mellon*, involving a prior foreclosure that was voluntarily dismissed by the mortgagee, was thought to be a sign that the court would fill this hole in the law.⁶⁷ Ultimately, however, this was not the case as the court dismissed *Bollettieri* prior to issuing an opinion on the issue.⁶⁸ Consequently, it is unclear whether voluntary dismissals are subject to the same holding.

Additionally, though *Bartram* holds that a dismissal can be "with or without" prejudice and still be subject to post-dismissal deceleration, in dicta the court also suggests that the distinction does matter in relation to damages.⁶⁹ For, though a dismissal with prejudice does not bar a claim based on the statute of limitations, the court suggests that a dismissal with prejudice could reduce the recoverable amount.⁷⁰ This would occur as defaults claimed under the first foreclosure would be barred from the subsequent action as they were already adjudicated.⁷¹ However, alternatively, and muddying the issue further, the *Bartram* court also stated that "the Bank had the right to file a subsequent mortgage

62. *Id.* at 1022.

63. *Id.*

64. *Id.*

65. *Id.*; Rodstein, *supra* note 47.

66. See *Bartram* 211 So. 3d 1009, 1012; see also Foreclosure Fraud Expert, BARTRAM DECISION IS GOOD FOR BORROWERS 12 (Nye Lavalley ed. 2017).

67. See Foreclosure Fraud Expert, *supra* note 66 at 14; see also *Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon*, 198 So. 3d 1140, 1142 (Fla. 2d DCA), review granted, (No. SC16-1680) (Fla. Nov. 2, 2016).

68. *Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017). However, in a non-binding concurrence, Justice Lawson seems to find that it does apply to voluntary dismissals as he rejects the continuous default theory stating that the statute of limitations starts either at acceleration or at maturity of the note. Whether the loan was dismissed voluntarily or involuntarily would be of no consequence.

69. See *Bartram*, 211 So. 3d 1009, 1020 (Fla. 2016) ("Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults"); see also Foreclosure Fraud Expert, *supra* note 66 at 9.

70. See *Bartram*, 211 So. 3d 1009, 1020 (Fla. 2016) ("Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults"); see also Foreclosure Fraud Expert, *supra* note 66 at 9.

71. See Foreclosure Fraud Expert, *supra* note 66 at 11.

foreclosure action – and to seek acceleration of all sums due under the note – so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default.”⁷² This is also in dicta, but contradicts the previous statement that some funds may not be recoverable by stating that “all sums due under the note” may be collected if the default that commences the action is not time barred.⁷³ The statement gives no exception to defaults that have already been adjudicated.⁷⁴ Therefore, the court leaves the question of how to calculate damages following the dismissal not only unanswered, but also contradictory within the same opinion.⁷⁵

Finally, while the court holds that a loan may be automatically returned to its pre-acceleration status following a dismissal - with a borrower required to once again make monthly payments - it neglects to address how these payments should be applied.⁷⁶ Most mortgages provide that “payments shall be applied to each Periodic Payment in the order in which it became due.”⁷⁷ Therefore, if a borrower made the first payment due after dismissal, that payment would not necessarily be applied to the month in which it was paid, but rather to the first instance of default.⁷⁸ Consequently, the borrower would not be able to pay the first payment due after dismissal unless the borrower paid all sums necessary to bring the loan current.⁷⁹ As many borrowers would not be able to bring the loan current, default would likely be inevitable even for those making full monthly payments.⁸⁰ The court did not clarify whether these instances of default - due to application of payment - would be subject to a foreclosure action.⁸¹

Thus, while *Bartram* provides reasoning and analysis for automatic deceleration by looking to contractual provisions, it fails to fully flesh out the rule for this area of foreclosure law. Rather, it brings to light several areas of concern, which may ripen into future litigation.

Affirmative Act Required

Many jurisdictions that have addressed deceleration have opted not to adopt an automatic deceleration rule due to the rule’s lack of notice to the borrower that the loan was reinstated. This concern was also present in the *Bartram* court, and

72. *Bartram*, 211 So. 3d 1009, 1021 (Fla. 2016).

73. *See id.*

74. *See id.*

75. *See id.*; *see also* Foreclosure Fraud Expert, *supra* note 66 at 11.

76. *See Bartram*, 211 So. 3d 1009, 1021 (Fla. 2016); *see also* Rodstein, *supra* note 47 (Discussing what constitutes a post-dismissal default).

77. Rodstein, *supra* note 47.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See generally Bartram*, 211 So. 3d 1009, 1021 (Fla. 2016); *see also id.*

appears in a concurrence⁸² written by Justice Lewis.⁸³ In the concurrence, Lewis writes that instead of addressing these questions the court “flatly holds that the dismissal itself—for any reason—’decelerates’ the mortgage and restores the parties to their positions prior to the acceleration without authority for support.”⁸⁴ Further, he finds that the reinstatement reasoning is flawed as there is no evidence that the “parties tacitly agreed to a ‘de facto reinstatement’ following the dismissal of the previous foreclosure action” and he refutes the majority’s claim that automatic deceleration is supported by the terms of the mortgage contract.⁸⁵ Instead, he advocates that:

[p]arties, particularly those as sophisticated as the banks and other lenders that routinely engage in such litigation, should be required to present evidence that the mortgage was actually decelerated and reinstated, rather than require our courts to fill in the blank and assume that deceleration automatically occurred upon dismissal of a previous foreclosure action.⁸⁶

Finally, Justice Lewis is concerned that the majority has misconstrued, and over expanded *Singleton*’s holding regarding res judicata.⁸⁷ For, while res judicata is a doctrine of equity, he reasons that “equitable principles are subordinate to statute enacted by the Legislature, including the statute of limitations.”⁸⁸

Other jurisdictions share Justice Lewis’ concerns and have adopted “affirmative act deceleration” as their standard for decelerating a loan following the involuntary dismissal of a foreclosure action. For example, this standard was adopted and can be explained by a New York court in *Deutsche Bank Nat. Tr. Co. Americas v. Bernal*.⁸⁹ Here, like in Florida, the court adopted a continuous default theory, wherein a mortgage payable in installments allows for separate causes of action for each missed payment.⁹⁰ As in Florida, the statute of limitations begins to run on each

82. Justice’s Lewis opinion is a concurrence and not a dissent because he recognizes “the concern raised by the Court and others regarding the need to avoid encouraging delinquent borrowers from abusing the lending process by remaining in default after an initial foreclosure is dismissed.” Therefore, Lewis’ concurrence is with the holding that the claim should not have been precluded, not the determination that deceleration should be automatic.

83. *Bartram v. U.S. Bank Nat. Ass’n*, 211 So. 3d 1009, 1023 (Fla. 2016), *reh’g denied sub nom.* *Bartram v. U.S. Bank Nat’l Ass’n*, 2017 WL 1020467 (Fla. Mar. 16, 2017) (J. Lewis, Concurrence).

84. *Id.*

85. *Bartram* 211 So. 3d 1009, 1023 (Fla. 2016), *reh’g denied sub nom.* *Bartram v. U.S. Bank Nat’l Ass’n*, 2017 WL 1020467 (Fla. Mar. 16, 2017) (J. Lewis, Concurrence) (“the mortgage itself did not create a right to reinstatement following acceleration *and* the dismissal of a foreclosure action. The contractual right to reinstatement under the terms of this mortgage existed *only* under specific conditions, which do not appear to have been satisfied in the record before this Court.”).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Deutsche Bank Nat. Tr. Co. Americas v. Bernal*, 56 Misc. 3d 915, 59 N.Y.S.3d 267, 274 (N.Y. Sup. Ct. 2017) (stating “While a court’s dismissal of a foreclosure action does not constitute a revocation of a lender’s election to accelerate a loan, a lender may revoke its acceleration by an affirmative act of revocation, provided that the borrower has not changed his or her position in reliance on the acceleration.”)

90. *Id.*

separate instance of default.⁹¹ However, distinguished from Florida, the New York court adds that “once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt.”⁹² More so, the court disagrees that “the effect of an involuntary dismissal of a mortgage foreclosure action is revocation of the acceleration, which reinstates the mortgagor’s right to continue to make payments on the note and the right of the mortgagee to seek acceleration and foreclosure based on the mortgagor’s subsequent defaults.”⁹³ Rather, the New York rule holds that “a court’s dismissal of a foreclosure action does not constitute a revocation of a lender’s election to accelerate a loan, [and] a lender may revoke its acceleration by affirmative act of revocation, provided that the borrower has not changed his or her position in reliance to acceleration.”⁹⁴

This rule can, thus, be broken down into two components, (1) affirmative act of revocation, and (2) reliance on acceleration. The latter item, reliance on acceleration, is used as justification for the affirmative act requirement. As in Florida, New York reasons that once a foreclosure is filed, a borrower relies “upon the acceleration as a basis for not paying monthly installments coming due after acceleration.”⁹⁵ For, “[w]hen the mortgage was accelerated, the borrower’s right and obligation to make monthly installments ceased.”⁹⁶ Consequently, though the foreclosure was commenced due to nonpayment, it is plausible that in the meantime, the borrower gained the ability to make monthly installments, but did not because they did not have the available funds to pay the entire accelerated balance.⁹⁷ Therefore, the court requires the first item, “affirmative act of revocation” to notify a borrower that acceleration has been revoked and they can no longer rely upon acceleration as a basis for nonpayment of monthly installments.⁹⁸ Basically, because acceleration changed a borrower’s position in reliance on acceleration, they should be informed when the basis of this reliance is revoked.

Other courts have reached similar conclusions, but rather cited to the acceleration clause as the basis for their holding. Specifically, they find that because the contract requires “an affirmative act . . . to accelerate a mortgage, the same is needed to decelerate. Accordingly, a deceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor.”⁹⁹

Vermont’s Supreme Court added specifications to what should be included in these communications, based on principals of equity.¹⁰⁰ Specifically, the court reasoned that “if a court’s dismissal with prejudice against the lender automatically

91. *Id.*

92. *Id.* at 270 (quoting *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dept.2012)).

93. *Id.* at 272.

94. *Id.* at 273.

95. *Id.* at 274.

96. *Id.*

97. *Id.* (“While the borrower may have defaulted in the first place due to financial inability, it is certainly plausible that the borrower may have, in the interim, acquired the ability to pay arrears and maintain current payments, though lacking the ability to pay off the entire debt.”)

98. *Id.* at 273.

99. *Cadle Co. II v. Fountain*, 281 P.3d 1158 at *1 (Nev. 2009).

100. *Cenlar FSB v. Malenfant*, 2016 VT 93, ¶ 36, 151 A.3d 778, 790 (Vt. 2016).

‘unaccelerates’ the debt and reinstates the borrower’s monthly payment obligation by operation of law with no further action by the lender, unsophisticated borrowers may be inexorably funneled into a new default.”¹⁰¹ Therefore, they hold that a lender must provide notice to borrowers on the remaining principal amount due, the monthly payments due, the date payments are due, how to make those payments, and that failure to make payments when due will constitute a default with the consequences outlined in the note.¹⁰² These provisions are comparable to the notice requirements prior to acceleration, and therefore, could be justified based on this existing contractual term.

Therefore, affirmative act deceleration may be explained under the New York rule that “[w]hile a court’s dismissal of a foreclosure action does not constitute a revocation of a lender’s election to accelerate a loan, a lender may revoke its acceleration *by an affirmative act of revocation, provided that* the borrower has not changed his or her position in reliance on the acceleration.”¹⁰³ However, there is some disagreement as to whether this holding extends to voluntary dismissals. Nevada explicitly found that a voluntary dismissal needed to be “accompanied by a clear and unequivocal act memorializing that deceleration,” thereby, finding that an affirmative act was required following dismissal to return the loan to its pre-foreclosure status.¹⁰⁴ Alternatively, it could be argued that a voluntary dismissal is an affirmative act by the lender. This reasoning would be based off the New York court’s language that “[a]s acceleration of the mortgage debt at issue was at the discretion of the lender, the borrower must be put on notice that the lender elected to accelerate the debt. *The commencement of a foreclosure action is sufficient to do so.*”¹⁰⁵ Thus, if commencement of an act is sufficient to put a borrower on notice that the debt has been accelerated, the lender’s dismissal of the case could be sufficient to put the borrower on notice that the lender is withdrawing acceleration. This reasoning would not pertain to involuntary dismissal, as involuntary dismissal is not an act by the lender.

Other unanswered inquiries under affirmative act deceleration are the same ones left open after *Bartram* – whether a dismissal with or without prejudice effects the amount of recoverable damages and what constitutes a default post deceleration. As in Florida, these gaps in the law will likely lead to further litigation.

101. *Id.*

102. *Id.* at 792 (“In other words, the court’s dismissal of the first foreclosure action ‘with prejudice’ can ‘unaccelerate’ the loan and restore borrowers’ obligation to make monthly payments toward the still-outstanding principal and associated interest, but lender, having accelerated the loan, must provide notice to borrowers of the remaining principal amount due, the monthly payments due, the date payments are due, how to make those payments, and that failure to make the payments when due will constitute a default, with the consequences outlined in the note).

103. *Deutsche Bank Nat. Tr. Co. Americas v. Bernal*, 2017 WL 2371951, at *5 (N.Y. Sup. Ct. May 5, 2017) (emphasis added).

104. *Cadle Co. II v. Fountain*, 281 P.3d 1158, at *1 (Nev. 2009).

105. *Deutsche Bank Nat. Tr. Co. Americas v. Bernal*, 2017 WL 2371951, at *5 (N.Y. Sup. Ct. May 5, 2017).

The “Free House” Theory

The question of what an accelerated loan’s status should be following the dismissal of a foreclosure action is further complicated by the existence of a third possibility – “the “free house” theory. This theory, rejects the continuous default theory by strictly applying *res judicata*.¹⁰⁶ As a result of this approach, subsequent foreclosure actions are barred following the dismissal of an initial suit.¹⁰⁷ And, because subsequent foreclosure actions are barred, borrowers would have a “free house” following dismissal of a foreclosure action because lenders would be unable to enforce the subject note and mortgage.¹⁰⁸ In defending the free house theory, proponents argue that “[t]his approach has several benefits: it is consistent with longstanding *res judicata* principles in other forms of civil litigation, it provides a necessary market-correcting incentive to promote greater responsibility among foreclosure litigators, and it alleviates the tremendous costs of successive foreclosure proceedings.”¹⁰⁹

The free house theory applies a stricter form of *res judicata* than is seen in continuous default models. For, under the theory a subsequent foreclosure action would be barred because it involves (1) the same parties – lender and borrower, (2) litigating a lawsuit on the same claim – the same mortgage, or (3) any other claim arising from the same transaction – so new and separate defaults would not save a claim from *res judicata*.¹¹⁰ The “new and separate” default rationale would not save the claim, because such new and separate defaults arise from the same transaction – the initial sale of real property.

In addition to being consistent with longstanding *res judicata* principles, proponents argue that the theory is good policy. That is, the theory would incentivize lenders to litigate responsibly or risk their claim being barred forever.¹¹¹ This rationale gestures towards the sloppy record keeping, fraudulent, or negligent practices that have plagued lenders and foreclosure filings and led to the mass dismissals that make the question of deceleration relevant.¹¹² Proponents reason that application of the free house theory would reduce or eliminate these issues due to the high cost of making such mistakes.¹¹³ If a lender must properly establish standing or

106. Wachspress et al., *supra* note 19, at 1116.

107. *Id.* at 1115–1116 (stating that courts are quick to sidestep well-established principles of *res judicata* as they are afraid to bar future attempts to foreclose, and thereby afraid of giving borrowers “free houses”).

108. *Id.*

109. *Id.*

110. *Res Judicata*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit.”).

111. Wachspress et al., *supra* note 19, at 1116 (stating that giving home owners free houses where banks fail to prove the elements required for foreclosure promotes greater responsibility among foreclosure litigators).

112. *E.g. id.* at 1120 (Stating that “servicers’ attorneys also relied on sloppy paperwork – and at times, on fraudulent and unethical practices in foreclosure proceedings.”)

113. See Wachspress et al., *supra* note 111, at 1116 and corresponding parenthetical.

risk losing their claim forever, they will have great incentive to exercise care in litigation.¹¹⁴

Similarly, proponents argue that preventing the possibility of successive foreclosure filings, following dismissal, benefits all parties by reducing litigation costs.¹¹⁵ In reality, this is likely a greater boon to borrowers. While lenders can generally bear the costs of successive foreclosure actions, these actions can present a far greater financial burden to the borrowers. However, proponents argue that preventing further litigation restores equity because subsequent suits often arise from a lender's failure to establish standing in the first suit, and thus, subsequent foreclosure filings, and the associated costs are an inequity unfairly thrust on the defendant borrowers.¹¹⁶

Though not a perfect application of the free theory, an example of aspects of it may be found in a decision by Ohio's Supreme Court. In *U.S. Bank Natl. Assn. v. Gullotta*, the court held that because the contract contained an acceleration clause, the parties opted out of the ability to claim new defaults after each missed payment.¹¹⁷ Thus, once a default occurs the contract remains in perpetual default.¹¹⁸ Consequently, a subsequent action would be barred due to res judicata as there would be no new default to support a cause of action.¹¹⁹ The court provides that a subsequent filing would have to evidence some change that distinguishes the new action from previously dismissed one to avoid res judicata.¹²⁰ This could include a change to the terms of the contract, credited payments, or reinstatement of the loan through affirmative act of the lender.¹²¹

Opponents to the free house theory claim that application of it would be inequitable and against public policy.¹²² The rationale being that it would be a "windfall to the borrower to dissolve a lender's right to the balance due under the note and mortgage – and to permit a borrower to ignore his obligation to make future installments – simply because a prior attempt to accelerate and prove prior defaults was unsuccessful."¹²³ Opponents also argue that it would be inequitable to allow a borrower the windfall of a free home after the borrower failed to honor their

114. See Wachspress et al., *supra* note 111, at 1116 and corresponding parenthetical.

115. See Wachspress et al., *supra* note 111, at 1116 (stating that giving home owners free houses where banks fail to prove the elements required for foreclosure alleviates the tremendous costs of successive foreclosure proceedings).

116. See *id.* at 1129 ("In asking courts to allow subsequent foreclosure attempts, banks ask states and homeowners to bear the psychological and economic costs of lenders' self-interested behavior.")

117. *U.S. Bank Natl. Assn. v. Gullotta*, 2008-Ohio-6268, ¶¶ 30-31, 120 Ohio St. 3d 399, 405, 899 N.E.2d 987, 992.

118. *Id.* ¶ 32 (stating that the court agreed that once the defendant missed the first payment under the note and mortgage, the defendant remained in default, and disagreeing that a new cause of action occurred with any subsequent missed payments).

119. *Id.* ¶ 35-36 (stating that res judicata applies where there is no change to the common nucleus of operative facts supporting the claim and only the amount of interest differs).

120. *Id.* (stating that res judicata can be thwarted where differences such as different acts of default by the mortgagor, different rates of interest and different amounts of principle owed, exist).

121. *Id.* ¶ 38.

122. Lewis Brooke BARTRAM; Patricia J. Bartram; and The Plantation at Ponte Vedra, Inc., Petitioners, v. U.S. BANK, National Association, Respondent., 2015 WL 308476 (Fla.), 24.

123. *Id.*

agreement to pay for it.¹²⁴ Further, opponents claim that the arrangement would harm borrowers as well as lenders, as lenders would be less incentivized to negotiate following a default.¹²⁵ As discussed previously, many foreclosure filings end in voluntary dismissals when the parties agree to foreclosure alternatives like loan modification.¹²⁶ Lenders would be disincentivized to provide such options if doing so would bar them from action on subsequent defaults.

On the other hand, the free house theory not only liberates a borrower from mortgage payments, but also eliminates the lingering inquiries haunting automatic and affirmative act deceleration theories. Specifically, the questions of (1) what damages would be recoverable in a subsequent foreclosure action, and; (2) what would constitute a new default after dismissal; would be irrelevant under the free house theory. This is true because under the theory there can be no subsequent foreclosure actions nor new defaults to collect on. However, because barring all attempts to enforce a mortgage debt is such a severe result it is unlikely that the free house theory would lead to simpler litigation. Indeed, while the practice would incentivize lenders to proceed cautiously through litigation, it would also disincentivize lenders from “working things out” with borrowers. As lenders would have only one opportunity to file a foreclosure action, it would be imprudent for them to allow loss mitigation options that would result in dismissal of the lawsuit. Thus, while this theory would offer a simplified answer to a mortgage loan’s post dismissal status, it also may run afoul of the policies favoring cooperation between defaulted borrowers and lenders.

APPLICATION TO NEW MEXICO

A July 2018 foreclosure rate report indicated that after 36 consecutive months of year-over-year decreases, nationwide foreclosure rates were again on the rise.¹²⁷ This comes a year after foreclosure activity was the lowest it had been since November 2005.¹²⁸ ATTOM Data Solutions, a national property database, clarified that the 2018 increase was not just a “one-month anomaly,” but “represented the third consecutive month with a year-over-year increase in 33 metro areas.”¹²⁹

124. See *id.* at 24 (“It would be a windfall to the borrower to dissolve a lender’s right to the balance due under the note and mortgage - and to permit a borrower to ignore his obligation to make future installments - simply because a prior attempt to accelerate and prove prior defaults was unsuccessful.”)

125. *Id.* at 25 (citing *U.S. Bank Nat’l Ass’n v. Gullotta*, 899 N.E. 2d 987, 997 (Ohio 2008) (O’Donnell, J., dissenting) “The borrower would be harmed because a lender that might otherwise have an incentive to postpone a foreclosure action in order to negotiate some more accommodating resolution might well be dissuaded from doing so because a prior dismissal might bar any future foreclosure action if the negotiated resolution failed.”).

126. See Short Sale Specialists: 8 Alternatives to Foreclosure, *supra* note 5.

127. *Foreclosure Starts Increase in 44 Percent of U.S. Markets in July 2018* (Aug. 21, 2018), ATTOM DATA SOLUTIONS, <https://www.attomdata.com/news/market-trends/foreclosures/july-2018-u-s-foreclosure-market-report/>.

128. *424,800 U.S. Properties with Foreclosure Filings in First Six Months of 2017, Down 20 Percent from Year Ago*, ATTOM DATA SOLUTIONS (July 20, 2017), <https://www.attomdata.com/news/heat-maps/midyear-2017-u-s-foreclosure-market-report/>.

129. *Foreclosure Starts Increase in 44 Percent of U.S. Markets in July 2018*, ATTOM DATA SOLUTIONS (Aug. 21, 2018), <https://www.attomdata.com/news/market-trends/foreclosures/july-2018-u-s-foreclosure-market-report/>.

ATTOM Data Solutions attributes this risk to “gradually loosening lending standards over the past few years [which] have introduced a modicum of risk back into the housing market, and that additional risk is resulting in rising foreclosure starts in a diverse sets of markets across the country.”¹³⁰ New Mexico finds itself one of these affected markets, with the tenth highest rate in the country.¹³¹ Further, New Mexico finds itself the only state with a year-over-year increase in REOs¹³² in the first half of 2018.¹³³ Thus, as New Mexico remains plagued by foreclosure filings, answering the question of how to resolve the ones that linger on through dismissal becomes a matter of public importance.

Having gathered policy arguments and considerations from statutory, case and contract law, the next step is to prudently apply these considerations to New Mexico. First, to establish if a successive claim is even possible following dismissal, New Mexico’s application of res judicata must be examined. New Mexico has held that though res judicata:

bars re-litigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits . . . the party asserting the claim must satisfy the following four requirements: (1) the parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits.¹³⁴

In determining whether a decision is on the merits, New Mexico has stated that “the designation of a dismissal as being ‘with’ or ‘without’ prejudice typically communicates whether there has been an adjudication on the merits.”¹³⁵ Further, New Mexico has “positively cited to cases that either (1) note that dismissal without prejudice is the proper remedy when a party fails to prove standing, or (2) approve of allowance of subsequent lawsuits.”¹³⁶ Thus, this existing case law suggests that New Mexico would not adhere to a strict application of res judicata, and the free house theory, as the courts have allowed subsequent foreclosures under certain circumstances.

The leeway provided by these “certain circumstance” filings allows for the possibility of either automatic or affirmative act deceleration. Thus, the next step is to establish if a continuous default theory applies as this is requisite to both theories.

130. *Id.*

131. *362,275 U.S. Properties With Foreclosure Filings In First Six Months Of 2018, Down 15 Percent From A Year Ago*, CISION PR NEWSWIRE (July 12, 2018), <https://www.prnewswire.com/news-releases/362-275-us-properties-with-foreclosure-filings-in-first-six-months-of-2018--down-15-percent-from-a-year-ago-300679668.html>.

132. Real Estate Owned – a class of property owned by a lender after an unsuccessful sale at a foreclosure auction.

133. *362,275 U.S. Properties With Foreclosure Filings In First Six Months Of 2018, Down 15 Percent From A Year Ago*, CISION PR NEWSWIRE (July 12, 2018), <https://www.prnewswire.com/news-releases/362-275-us-properties-with-foreclosure-filings-in-first-six-months-of-2018--down-15-percent-from-a-year-ago-300679668.html>.

134. *The Bank of New York v. Romero*, 2016-NMCA-091, ¶ 15, 382 P.3d 991, 996.

135. *Id.* at ¶ 24.

136. *Id.* at ¶ 17.

Recall that a continuous default theory may be supported based on a pre-accelerated loan's installment contract nature, wherein each missed payment gives rise to a new and separate instance of default. The alternative to the continuous default theory is the Ohio rule. Under the Ohio rule, a default occurs at the first missed monthly payment and continues until the default is cured or the loan is otherwise reinstated.

New Mexico law does not seem to favor one side or the other, however, there seems to be greater support for a continuous default theory given the nature of an installment contract and the terms of most mortgage contracts. For, most mortgages contain a provision wherein the holder may accelerate during "any default by Borrower regardless of any prior forbearance."¹³⁷ This language suggests that multiple defaults may occur, both because the word "any"¹³⁸ suggests the possibility of multiple defaults. Further, the clause's statement regarding "prior forbearance" seems to indicate that more than one default can occur, as there must be a preceding default for there to be prior forbearance on a preceding default. More generally, the Ohio Court's position seems at odds with the value of freedom to contract, as it stipulates that following a missed payment the entire contract is automatically in breach. This is inconsistent with contract principles such as forbearance that may allow parties to continue a contract despite a default to the terms.¹³⁹ Therefore, given contract principles, the continuous default theory seems a more logic-based conclusion than the Ohio rule.

Having established that successive actions may be filed, and that a continuous default theory may apply, the next step is to determine if a dismissal should automatically decelerate a loan or if an affirmative act is required. Under *Bankers Trust Co. of California, N.S. v. Baca*, New Mexico found that "[a] dismissal without prejudice . . . [leaves] the action as though it was never filed and thus immune from a later determination that the same dismissal was, instead, with prejudice and with res judicata effect."¹⁴⁰ As filing of an action initiates acceleration, the court's determination that a dismissal without prejudice leaves the action as though it was never filed could suggest that deceleration is automatic. However, while this holding could provide precedent for a court to allow automatic deceleration, the holding does not appear to represent a broadly applicable rule, as much as one tailored for the facts of the specific case. Indeed, in a move potentially contrary to automatic deceleration, New Mexico has applied its revival of causes of action statute to foreclosures.¹⁴¹ This is potentially contrary to automatic deceleration as the statute requires an affirmative act before a cause of action may be revived. Though the statute has not been equated to deceleration of a loan, in operation they

137. SAMPLE MORTGAGE, https://www.translegal.com/wp-content/uploads/real_property_appendix_1.pdf (last visited Nov. 8, 2018).

138. *Any*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/any> (last visited Dec. 22, 2017) ("one, some, or all indiscriminately of whatever quantity").

139. *Forbearance*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act of refraining from enforcing a right, obligation, or debt.").

140. *Bankers Trust Co. of California, N.S. v. Baca*, 2007-NMCA-019, ¶ 11, 141 N.M. 127, 129.

141. N.M. Stat. Ann. § 37-1-16. Revival of Causes of Action. *See also*, *Joslin v. Gregory*, 2003-NMCA-133, ¶ 1, 134 N.M. 527, 527, 80 P.3d 464, 464; *Lea Cty. State Bank v. Markum Ranch P'ship*, 2015-NMCA-026, ¶ 1, 344 P.3d 1089, 1090, cert. denied sub nom. *Lea Cty. v. Markum Ranch*, 2015-NMCERT-003, ¶ 1, 346 P.3d 1162.

have the same effect of resetting the statute of limitations so that a new action may be brought.¹⁴²

Further, “New Mexico, unlike some other jurisdictions, permits revival by way of an admission even where the debtor’s acknowledgment does not constitute a new promise, for example, where the admission is accompanied by an expression of unwillingness to pay.”¹⁴³ This seems to indicate that the courts value that a borrower is notified of the debt, even if there is no intent by the borrower to resume payment on it. This undoubtedly benefits borrowers, especially unsophisticated individuals, as it plainly informs them of the vital information related to their loan after a dismissal. Further, it removes ambiguity of what is owed and what actions must be taken. Removing ambiguity is valuable as it may prevent future defaults and subsequent litigation, and thereby supports goals of judicial efficiency by reducing litigation. Application of affirmative act deceleration also serves as a compromise between the automatic deceleration and free house theories. Borrowers are provided notice of their status following dismissal of a foreclosure action and lenders are allowed the opportunity to enforce the subject note and mortgage should future default occur. Borrowers would not be entitled to a “windfall” free home, and lenders would be held accountable for ensuring action is taken to restart a loan.

Consequently, based on New Mexico’s existing law and careful consideration of the presented options, the solution of greatest merit is affirmative act deceleration, as affirmative act deceleration upholds New Mexico’s precedential holdings on *res judicata* following dismissal of a foreclosure action, honors contractual principles, and equitably provides notice to borrowers following the dismissal of a foreclosure action. However, if New Mexico courts are faced with this question, and apply this result, they should be wary of the gaps related to calculation of damages in a subsequent filing and to the resolution of how payments should be applied. By closing these gaps in the law, a court may preemptively remove the ambiguity from a too ambiguous topic.

142. N.M. Stat. Ann. § 37-1-16 (“Causes of action founded upon contract shall be revived by the making of any partial or instalment [installment] payment thereon or by an admission that the debt is unpaid, as well as by a new promise to pay the same”).

143. *Joslin v. Gregory*, 2003-NMCA-133, ¶ 12, 134 N.M. 527, 530, 80 P.3d 464, 467