

MWZM Review

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ABANDONMENT OF ACCELERATION BY CANCELLATION OF NON-JUDICIAL SALE IS ALIVE AND WELL IN ARKANSAS

INSIDE

-By Mark D. Cronenwett, Litigation Director

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On May 31, 2023, the Arkansas Court of Appeals, in an appeal handled by MWZM, reversed the trial court's dismissal of a foreclosure suit on limitations grounds. At issue in the case was a mortgage that had been through several stop-and-start non-judicial foreclosure sales. Each time a sale was cancelled, the lender recorded a "Notice of Cancellation". Under long-standing Arkansas case law, the recording of a "Notice of Cancellation" had the effect of abandoning the acceleration of the loan. The defendant, however, argued that this common law principle was abrogated by the Arkansas Legislature in 1989 when it codified two previously recognized common-law doctrines of tolling—either through the tendering of partial payments or by the borrower's written acknowledgment of the debt. According to the defendant, the Legislature's statutory adoption of these two theories of tolling necessarily jettisoned all previously recognized common-law principles governing the abandonment of acceleration. The trial court agreed with the defendant and dismissed the foreclosure suit.

The Court of Appeals agreed with MWZM's argument that the Legislature did not intend, through its statutory adoption of two tolling theories, to abrogate the State's common-law doctrines for acceleration abandonment. The Court of Appeals looked to the plain language of the 1989 statutory amendments and found nothing that expressed an intention by the Arkansas Legislature to abrogate these theories. Further guiding the Court of Appeals' analysis was the rule that the Court should avoid giving interpretations of statutes that "defy common sense and produce absurd results." As a result, the Court of Appeals determined that the original 2010 acceleration of the debt was abandoned by the subsequent recordings of "Notices of Cancellation", resulting in the lender's 2019 foreclosure suit's being timely filed. This is a huge win for mortgage lenders in Arkansas attempting to foreclose mortgages that have previously been posted for foreclosure but then pulled back due to loss mitigation efforts, FEMA holds, service transfers, or the like. See *Wilmington Savings Funds Society v. Milton Smith et al.*, Arkansas Court of Appeals, Division 1, Appeal No. CV-20-508.

