

STATUTE OF LIMITATIONS NEWS

Today, Florida's Fifth DCA and Second DCA issued two seminal opinions; [*Klebanoff v. Bank of N.Y. Mellon*](#), and [*Huntington National Bank v. Watters*](#), which clarify the cloud of uncertainty that had engulfed the statute of limitations issue in Florida and provide a strong basis for lenders that are filing subsequent foreclosures of the same loan based on the same initial default date.

In *Klebanoff*, the Bank filed its foreclosure action in 2014 alleging that the Klebanoffs defaulted for failing to make the March 1, 2009 payment and *all subsequent payments due thereafter*. *Klebanoff v. Bank of N.Y. Mellon*, No. 5D16-1637, slip op. at 2 (Fla. 5th DCA June 30, 2017). The trial court entered a final judgment of foreclosure. *Id.* The Klebanoffs appealed the trial court's ruling on the basis of *Hicks*, arguing that the bank's action was based on a default date that occurred more than five years prior to the filing of the complaint. *Id.*

Today, the Fifth DCA affirmed. *Id.* at 5. In doing so, Judge Evander clarified the basis for the court's ruling in *Hicks*—in *Hicks*, the bank stipulated at trial to proceed on the **initial default date only**, which occurred more than five years prior to the filing of the complaint. *Id.* at 2-3 (citing *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015)). Restricting the default date to one outside of five years, without alleging or proving all subsequent payments at the time of trial, proved fatal for the banks in *Hicks* and *Collazo*. *Hicks*, 178 So. 3d at 958. *See also Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012 (Fla. 3d DCA 2016). In contrast, the Bank in *Kelbanoff* alleged and proved “that the Klebanoffs had defaulted on each and every mortgage payment from March 1, 2009 and onward.” *Klebanoff*, slip op. at 4.

Klebanoff is of major significance in that it distinguished *Hicks v. Wells Fargo Bank N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015) and ruled that a foreclosure action premised on an initial default date occurring more than five years prior to the filing of the complaint, **is not barred** by the statute of limitations **provided the Bank alleges and proves a continuous state of default which includes defaults within five years of the filing of the complaint.** *Klebanoff*, slip op. at 5 (citing *Bolletieri Resort Villas Condo, Ass'n v. Bank of N.Y. Mellon*, 198 So. 3d 1140 (Fla. 2d DCA 2016)). Notably, in a brief but significant concurring opinion, *Ventures Trust v. Johnson*, Judge Evander noted that “it was error for the trial court to dismiss its foreclosure action on statute of limitations grounds where the complaint alleged defaults both within and outside the five year statute of limitations.” [*Ventures Trust v. Johnson*](#), No. 5D15-1020, slip op. at 2 (Fla. 5th DCA June 30, 2017) (Evander, J., concurring).

Similarly, in *Watters*, the Second DCA reversed the trial court’s entry of summary judgment in favor of the borrowers. *Huntington Nat’l Bank v. Watters*, No. 2D16-4042, slip op. at 3 (Fla. 2d DCA June 30, 2017). In *Watters*, the bank filed a second action based on the same initial default date alleged in the first action, and **all subsequent payments.** *Id.* at 2. The trial court found that the bank was barred by the statute of limitations. *Id.* However, on appeal, the Second DCA reversed, concluding that the bank was not barred because the “complaint had asserted a ‘continuing state of default’ since August 1, 2007, [the bank] had the right to foreclose for each default which was within the statutory period.” *Id.*

Both of these opinions will undoubtedly have a major impact on the strategy of plaintiffs’ counsel going forward. Additionally, these two cases mark a change in the tides and support what many plaintiffs’ attorneys viewed as the intent of *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA

2016)—that a subsequent action based on the same initial default date and all subsequent payments is not barred.