

# Locke Lord QuickStudy: The Missing Link in the Chain: Second Circuit Grants Immunity to Assignees of GSE Loans

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With mortgage delinquencies nearly doubling during the pandemic and serious delinquencies (mortgages more than 90 days past due) increasing to levels not seen since 2008, the Second Circuit offered some reprieve to Government Sponsored Entities (“GSE”) should they contemplate assigning any of their loans or the nearly \$7 trillion of mortgage debt they’re said to guarantee.<sup>1</sup> On December 10, 2020, the Second Circuit Court of Appeals held for the first time that an assignee of the federal government is immune to a state’s statute of limitations period. See *Windward Bora, LLC v. Wilmington Sav. Fund Soc’y, FSB*, No. 19-3626, 2020 WL 7250869 (2d Cir. 2020).

The Second Circuit examined the Northern District of New York’s grant of summary judgment against an owner of property that asserted that the statute of limitations had expired for any claim to enforce the mortgage on the property. Wells Fargo Bank, N.A (“Wells Fargo”), a prior assignee of the mortgage, had filed a foreclosure action in 2010 against borrowers Wayne and Gwendolan Carter, but that action was ultimately dismissed in 2016. Any subsequent action appeared time-barred because of New York’s six-year statute of limitation period. However, in 2014, during the pendency of that action, Wells Fargo assigned the note and the mortgage to the Department of Housing and Urban Development (“HUD”). The note and mortgage were then assigned four more times. Relying on New York’s six-year statute of limitations period, Plaintiff Winward Bora, LLC, an entity that acquired title to the borrowers’ property, commenced an action to have the mortgage encumbering the property extinguished against Defendant, Wilmington Savings, which was assigned the unpaid note and mortgage in 2017.

In analyzing this case, the Second Circuit first determined that New York’s six-year limitations period on foreclosure actions does not apply to actions brought by the United States or its federal agencies. While this position was well-established, the Second Circuit noted that “[w]e have not yet addressed, however, whether the federal government’s immunity to state limitations periods is inherited by an assignee of the federal government.” The Second Circuit affirmatively answered this question and held that “under traditional common law principles governing assignments, the assignee of the United States stands in the shoes of the United States and is entitled to rely on the limitations periods prescribed by federal law . . . because it improves the marketability of instruments held by the United States, thereby giving the United States greater flexibility in monetizing its claims.”

The Court further explained that it sees no basis to “conclude[e] that a federal government assignee’s entitlement

to immunity turns on its ability to demonstrate some benefit to the federal government” and that the only appellate state court decision on this issue “hardly stands for the proposition that an assignee must show a benefit to HUD to avoid the state’s six year statute of limitations.” The Second Circuit did not seem concerned that HUD was simply an assignee in the middle of the chain or that HUD had been assigned the note and mortgage after the clock was already running on the statute of limitations.

Interestingly, the Defendant also asserted an additional defense that such immunity extends to any federally insured loan rather than just those where the United States or one of its agencies was an assignee. However, the Second Circuit was reluctant to apply its holding so broadly as to provide such immunity to the federal government’s insured loans finding that “defendant’s status as a HUD assignee offers a sufficient basis for affirming the district court’s conclusion that the defendant is immune from the state limitations period.”

While *Windward Bora*’s implications are in line with neighboring circuits, the Second Circuit has provided a clear defense for lenders in the ever-increasing statute of limitations quiet title actions or defenses: If the note and/or mortgage have the United States (or one of its agencies) somewhere in the chain of title, the statute of limitations cannot be asserted by the borrower and/or property owner. On the other hand, the Second Circuit has left another pressing issue ripe for consideration: Whether the same principles of immunity should be applied generally to the loans insured by the federal government. Undoubtedly, if the Second Circuit addresses this issue and reaches the same conclusion, a much larger number of loans will be implicated.

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1. [https://www.washingtonpost.com/business/economy/federal-government-has-dramatically-expanded-exposure-to-risky-mortgages/2019/10/02/d862ab40-ce79-11e9-87fa-8501a456c003\\_story.html](https://www.washingtonpost.com/business/economy/federal-government-has-dramatically-expanded-exposure-to-risky-mortgages/2019/10/02/d862ab40-ce79-11e9-87fa-8501a456c003_story.html);  
<https://www.corelogic.com/blog/2020/11/behind-the-paradox-of-rising-mortgage-delinquencies-amid-rising-home-prices.aspx>

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