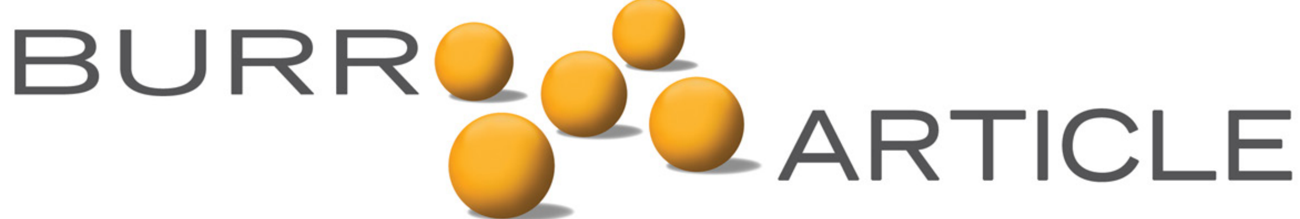

Cure and Reinstatement of Home Mortgages in Chapter 13: Florida's Bright-Line Rule is Not So Bright

Section 1322(c)(1) of the Bankruptcy Code[1] allows debtors to cure defaults and reinstate a mortgage on their principal residence "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law."[2] Like many provisions of the Bankruptcy Code, this one appears fairly straightforward at first glance; a debtor has the right to cure and reinstate a home mortgage until the property is sold at a foreclosure sale.

In Florida, however, bankruptcy courts have interpreted section 1322(c)(1) in a way that allows debtors to cure and reinstate a home mortgage even *after* a foreclosure sale, as long as the petition is filed prior to the clerk's issuance of the certificate of sale under § 45.031, Fla. Stat. (2014). Although certificates of sale are generally issued shortly after the conclusion of a foreclosure sale, and § 45.031(4) requires the clerk to issue them "promptly," for one reason or another there are delays in the process. Whether the delay is a matter of hours, or a matter of days, it gives rise to an extended right to cure and reinstate for an indefinite period of time, resulting in a number of legal and practical problems when a debtor takes advantage of such extended right.

The Hypothetical Case

On July 1, 2014, at 11:00 a.m., the clerk of a Florida state court (the "State Court") conducted a foreclose sale of a borrower's (the "Borrower") principal residence (the “Property”), which was purchased by a third party at the foreclosure sale. The foreclosure sale was conducted pursuant to a final judgment of foreclosure entered in favor of the mortgagee holding the first mortgage on the Property, and pursuant to § 45.031, Fla. Stat. The purchaser deposited the full cash price of his bid with the clerk, and the sale was otherwise procedurally sound. Pursuant to the foreclosure judgment, the redemption price was $100,000.00.

On the same day, at 6:00 p.m. (seven hours after the scheduled time for the foreclosure sale), Borrower files a chapter 13 petition and plan, proposing to cure defaults by paying the arrears, totaling $10,000.00, over sixty months, in addition to making the regular monthly mortgage payments through maturity in twenty years. Borrower also files a motion in the foreclosure case to vacate the foreclosure sale, citing to her post-sale bankruptcy petition as support for the motion.

[1] All references to the Bankruptcy Code are to title 11 of the United States Code.
[2] 11 U.S.C. § 1322(c)(1).

On July 2, 2014, the State Court enters an order denying Borrower's motion, finding that her bankruptcy petition was filed after the foreclosure sale was conducted, and therefore, the automatic stay imposed pursuant to federal bankruptcy law did not prevent the foreclosure sale. Later that day, the clerk of the State Court issues a certificate of sale for the Property pursuant to the State Court's order.

Under 11 U.S.C. § 1322(c)(1), "a lien on the debtor's principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." In the hypothetical case described above, there is no question that a foreclosure sale was conducted prior to the filing of Borrower's bankruptcy petition. The State Court appropriately held that the foreclosure sale should not be vacated because it was conducted prior to the filing of the bankruptcy petition and application of the automatic stay under 11 U.S.C. § 362. Therefore, under the plain language of section 1322(c)(1) of the Bankruptcy Code, it would appear that the bankruptcy court should also deny Borrower's right to cure and reinstate the mortgage through a chapter 13 plan.

Notwithstanding the plain language of the Bankruptcy Code (and possibly the *res judicata* effect of the State Court's order), the current law in Florida requires a contrary result. Beginning with the decision of *In re Jaar*, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995) (J. Glenn), bankruptcy courts in Florida have adopted a bright-line rule that a debtor may cure and reinstate a home mortgage through a chapter 13 plan until issuance of the certificate of sale. The more precise holding of *In re Jaar* is that a debtor is not able to cure and reinstate her home mortgage if her chapter 13 bankruptcy petition is filed after issuance of the certificate of sale; however, the language of the decision is broad enough to support the inverse conclusion that a debtor may cure and reinstate at any time prior to issuance of the certificate of sale.[3]

The decision in *Jaar* was the first published decision in Florida to consider the 1994 enactment of section 1322(c)(1). To the author's knowledge, every published opinion considering the same factual scenario, i.e. a debtor attempting to cure and reinstate a home mortgage through a chapter 13 plan after issuance of the certificate of sale, has adopted the holding in *Jaar*.[4]

In the hypothetical case described above, the bankruptcy court would likely decide the issue several months later at the hearing on confirmation of the chapter 13 plan, at which point the foreclosure sale would then be vacated and the purchase price returned despite the State Court's order, prejudice to the participants in the auction, and the passage of time. This cannot be the result

[3] *See In re Jaar*, 186 B.R. 148, 154 (Bankr. M.D. Fla. 1995) ("Using the filing of the certificate of sale as the point in Florida where a debtor's right to cure defaults and reinstate a mortgage terminates is consistent with the provisions of the new § 1322(c)(1) . . . .").

[4] *See, e.g. In re Balterman*, 2012 WL 6204858 (Bankr. M.D. Fla. Dec. 13, 2012); *In re Domenech*, 2012 WL 293662 (Bankr. M.D. Fla. Jan. 13, 2012); *In re Reid*, 200 B.R. 265 (Bankr. S.D. Fla. 1996).

intended by Congress in enacting section 1322(c)(1), and may not even be the result intended by Florida bankruptcy courts applying this "bright-line" rule.

Background of Florida's Bright-Line Rule

I. Current Case Law Split

Courts across the country are divided on the meaning of the phrase "sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law," and decisions fall into two general categories. One line of cases applies what is sometimes referred to as the "gavel" rule, where "the debtor's right to cure is cut off once the gavel falls at the foreclosure auction."[5] Under the gavel rule, the "foreclosure sale" referenced in section 1322(c)(1) is construed as "a single, discrete event."[6] The reference in the statute that the foreclosure sale be "conducted in accordance with applicable nonbankruptcy law" simply "requires that state law be consulted to assure the sale was noticed, convened, and held (i.e., 'conducted') in compliance with state law."[7] In other words, even if state law requires post-auction procedures to conclude and effectuate the foreclosure sale, the right to cure and reinstate under section 1322(c)(1) expires at the point in time when the sale is "conducted" (i.e. the public auction) rather than any "subsequent steps required to give that sale effect."[8]

In contrast to the gavel rule, the alternative interpretation of section 1322(c)(1) is that "the debtor's right to cure extends beyond the auction date to the time where the sale is completed under applicable state law."[9] This alternative theory has been described as the "completed-transfer approach" because these courts construe the phrase "sold at a foreclosure sale" in section 1322(c)(1) in an expansive way to include the entire foreclosure process from the auction to the final steps required by statute to transfer property rights to the purchaser or extinguish the debtor's right to redeem the property.[10] In other words, courts following the completed-transfer approach hold that property is only "sold" under section 1322(c)(1) when the foreclosure sale process is complete.

---

[5] *In re LaPointe*, 505 B.R. 589, 595 (1st Cir. BAP 2014); *see also In re Crawford*, 232 B.R. 92, 96 (Bankr. N.D. Ohio 1999) ("a straightforward reading of the first clause is that the cut-off point is when the gavel comes down on the last bid at the foreclosure sale").

[6] *LaPointe*, 505 B.R. at 595; *see also In re Connors*, 497 F.3d 314, 320 (3d Cir. 2007) ("the preposition 'at' in 'sold at a foreclosure sale' signifies a discrete event, rather than an ongoing process").

[7] *In re McKinney*, 344 B.R. 1, 6 (Bankr. D. Me. 2006).

[8] *In re Watts*, 273 B.R. 471, 476 (Bankr. D.S.C. 2000) (*quoting In re Bobo*, 246 B.R. 453, 456 (Bankr. D.C. 2000)).

[9] *In re Watts*, 273 B.R. at 476 (citing *McEwen v. Federal Nat'l Mortgage Ass'n*, 194 B.R. 594, 596 (N.D. Ill. 1996) (holding that sale not completed until court order of confirmation); *In re Rambo*, 199 B.R. 747, 750–51 (Bankr. W.D. Okla. 1996) (holding that sale was not completed until court enters order confirming sale); *In re Jaar*, 186 B.R. 148, 151–54 (Bankr. M.D. Fla. 1995) (concluding that a foreclosure sale was not completed until the certificate of sale was filed with the clerk of court) (parentheticals in original)).

[10] George Bourguignon, *Interpretation of Bankruptcy Code S 1322(c)(1) Arguing for A Bright-Line Approach to the Debtor's Statutory Right to Cure A Residential Mortgage Default*, 7 U.C. Davis Bus. L.J. 461, 478 (2007).

For instance, the Oklahoma state foreclosure statute provides that "a judicial sale on foreclosure is neither conclusive nor binding in the sense of transferring legal title to the purchaser until it is effectively confirmed [by court order]."[11] Applying the completed-transfer approach, at least one Oklahoma bankruptcy court has held that "a Chapter 13 debtor whose petition in bankruptcy is filed in this district after a foreclosure sale has been conducted but before an order confirming the sale has been entered, may cure [and reinstate a home mortgage]."[12]

II. Ambiguity in Statute

The very fact that courts are divided on the statute's meaning suggests that the section is ambiguous, or susceptible to multiple meanings, although courts disagree on this point.[13] Despite what some may say, there are inherent tensions in the language of section 1322(c)(1). For instance, the statutory section begins by suggesting bankruptcy law preemption over inconsistent state law on the debtor's right to cure and reinstate a home mortgage ("Notwithstanding . . . applicable nonbankruptcy law . . . ") but then suggests that the event of expiration is the occurrence of a foreclosure sale "that is conducted in accordance with applicable nonbankruptcy law." This tension is further complicated by the fact that the statute points to the conducting of a foreclosure sale as the determinative event of expiration, yet also requires that such sale comply with applicable nonbankruptcy law, a determination that is appropriately made by the governing body *after* the sale, whether through entry of an order confirming the sale, or as in Florida, issuance of a certificate of sale by the clerk of court.

III. Pre-Statutory Case Law

Prior to legislative enactment, a consensus of courts held that a debtor's right to cure and reinstate a mortgage expired at the time of a foreclosure sale, with the seminal case being *In re Glenn*, 760 F.2d 1428 (6th Cir. 1985). In *Glenn*, the Sixth Circuit adopted a bright-line test similar (if not identical) to the gavel rule:

> The event we choose as the cut-off date of the statutory right to cure defaults is the sale of the mortgaged premises. We pick this in preference to a number of other potential points in the progress of events ranging from the date of first default to the day the redemption period expires following sale. We do so for the following reasons, which admittedly may form a large target for criticism:

---

[11] *Sooner Fed. Sav. & Loan Ass'n v. Oklahoma Cent. Credit Union*, 790 P.2d 526, 529 (Okla. 1989) (citing 12 O.S. 1981 §726).

[12] *In re Rambo*, 199 B.R. 747, 751 (Bankr. W.D. Okla. 1996).

[13] *See In re Townsville*, 268 B.R. 95, 114 (Bankr. E.D. Pa. 2001) (compiling case law on both sides of the debate finding the statute ambiguous and unambiguous, and concluding that the statute is ambiguous because "it is impossible to determine, solely from the language of the statute, whether Congress intended a debtor's cure rights to terminate on the date of the auction sale or upon completion of the foreclosure sale process").

(a) The language of the statute is, to us, plainly a compromise, as we have earlier mentioned. Picking a date between the two extremes is likewise a compromise of sorts.

(b) The sale of the mortgaged property is an event that all forms of foreclosure, however denominated, seem to have in common. Whether foreclosure is by judicial proceeding or by advertisement, and regardless of when original acceleration is deemed to have occurred, the date of sale is a measurable, identifiable event of importance in the relationship of the parties. It is at the heart of realization of the security.

(c) Although the purchaser at the sale is frequently the security holder itself, the sale introduces a new element-the change of ownership and, hence, the change of expectations-into the relationship which previously existed.

(d) The foreclosure sale normally comes only after considerable notice giving the debtor opportunity to take action by seeking alternative financing or by negotiating to cure the default or by taking advantage of the benefits of Chapter 13. Therefore, setting the date of sale as the cut-off point avoids most of what some courts have described as the "unseemly race to the courthouse." Concededly no scheme can avoid that possibility altogether, but the time and notice requirements incident to most sales at least provide breathing room and should deter precipitate action that might be expected if the cut-off date were measured by the fact of notice of acceleration or the fact of filing suit.

(e) Any earlier date meets with the complaint that the rights conferred by the statute upon debtors to cure defaults have been frustrated.

(f) Any later date meets with the objection that it largely obliterates the protection Congress intended for mortgagees of private homes as distinguished from other secured lenders.

(g) Any later date also brings with it the very serious danger that bidding at the sale itself, which should be arranged so as to yield the most attractive price, will be chilled; potential bidders may be discouraged if they cannot ascertain when, if ever, their interest will become finalized.

In so ruling we avoid any effort to analyze the transaction in terms of state property law. Modern practice varies so much from state to state that any effort to satisfy the existing concepts in one state may only create confusion in the next. Thus, in construing this federal statute, we think it unnecessary to justify our construction by holding that the sale "extinguishes" or "satisfies" the mortgage or the lien, or that the mortgage is somehow "merged" in the judgment or in the deed of sale under state law.[14]

[14] *In re Glenn*, 760 F.2d 1428, 1435-36 (6th Cir. 1985).

Courts in Florida adopted a similar approach, viewing the issue as a federal, rather than state law, question, and agreeing with *Glenn* that "reliance on state law to determine whether a debtor may cure a mortgage default under § 1322 of the Bankruptcy Code is misplaced."[15] A chapter 13 debtor's statutory right to cure and reinstate is designed by Congress to ameliorate the "harsher mercies of state law," and as a federal interest, is controlled by federal law.[16] One of the "harsher mercies of state law" is the debtor's only option of redeeming her home after entry of a foreclosure judgment, requiring payment in full in cash of mortgage indebtedness, rather than monthly payments of arrears, plus current monthly payments, over time under a chapter 13 plan.

In *In re Smith*, 85 F.3d 1555, 1560 (11th Cir. 1996), the Eleventh Circuit agreed with the *Glenn* decision and its reasoning. Moreover, the Eleventh Circuit found that even though a debtor may "retain[] his statutory right of redemption after filing his Chapter 13 petition, he cannot modify that right of redemption under a Chapter 13 plan that is filed after a foreclosure sale."[17] In other words, under *Glenn* and *Smith*, the right to cure and reinstate expires at the time of the public auction, and the post-auction retention of a right to redeem does not alter this outcome.

The Third Circuit Court of Appeals, in *In re Roach*, diverged from the consensus of courts following *Glenn* and held that the foreclosure judgment, rather than the sale, extinguishes the debtor's right to cure and reinstate.[18] Congress enacted subsection 1322(c)(1) "to overrule *Roach* and establish a uniform time -- the 'foreclosure sale' -- for expiration of a debtor's federal right to cure."[19]

IV. Legislative History

Despite the seemingly clear intent of Congress in the enactment of section 1322(c)(1) to codify *Glenn* and abrogate *Roach*,[20] the legislative history of section 1322(c)(1) includes some contradictory and confusing statements. The House Report, partially quoted at footnote 19 herein, goes on to say that:

> This section of the bill safeguards a debtor's rights in a chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure

[15] *Boromei v. Sun Bank of Tampa Bay*, 92 B.R. 516, 517 (M.D. Fla. 1988).
[16] *Id.* at 517-18.
[17] *In re Smith*, 85 F.3d 1555, 1560 (11th Cir. 1996).
[18] *In re Roach*, 824 F.2d 1370 (3d Cir. 1987).
[19] *In re Connors*, 497 F.3d 314, 322 (3d Cir. 2007); *see also* H.R. Rep. No. 835, 103d Cong.2d Sess. 52 (1994), 1994 U.S.C.C.A.N. 3340 ("Section 1322(b)(3) and (5) of the Bankruptcy Code permit a debtor to cure defaults in connection with a chapter 13 plan, including defaults on a home mortgage loan. Until the Third Circuit's decision in Matter of Roach, 824 F.2d 1370 (3d Cir.1987), all of the Federal Circuit Courts of Appeal had held that such right continues at least up until the time of the foreclosure sale. See In re Glenn, 760 F.2d 1428 (6th Cir.1985), cert. denied, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985); Matter of Clark, 738 F.2d 869 (7th Cir.1984), cert. denied, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985). The Roach case, however, held that the debtor's right to cure was extinguished at the time of the foreclosure judgment, which occurs in advance of the foreclosure sale. This decision is in conflict with the fundamental bankruptcy principle allowing the debtor a fresh start through bankruptcy.") (*quoted in* 232 B.R. at 97).
[20] *See* note 19, *supra*; *cf.* note 29, *infra.*

> sale under applicable nonbankruptcy law. However, if the State provides the debtor more extensive “cure” rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy.[21]

This statement materially deviates from the actual language of section 1322(c)(1), as well as the case law the statute was designed to codify. Section 1322(c)(1) sets forth a cut-off point focused on the foreclosure sale, "notwithstanding . . . applicable nonbankruptcy law" that may allow additional redemption rights retained beyond the sale. *Glenn* explicitly avoided an analysis based upon application of the various state law foreclosure procedures, and instead picked a point in time common to all state law foreclosures -- the sale of property.

The House Report also refers to the terms "cure" and "redemption" as if synonymous; they are not. The right to "cure" refers to bringing a mortgage current; the right to "redeem" refers to paying the mortgage in full in cash so that the mortgage ceases to exist and nothing remains subject to cure. In general, mortgage contracts only allow the right to "cure" prior to acceleration and foreclosure. After the foreclosure process begins, the state law right of redemption is often the debtor's only remedy (other than foreclosure defenses). In other words, the terms "cure" and "redeem" are mutually exclusive in context and meaning. Again, Congress created a statutory right to cure and reinstate a home mortgage through a chapter 13 petition and plan with the enactment of section 1322(b) of the Bankruptcy Code, a right that now continues through the foreclosure process and until a foreclosure sale. But that right is federal right, not one typically available under state law. In *Glenn* and *Smith*, the Circuit Courts distinguish in the statute between the right to redeem and the right to cure, and find that section 1322 only concerns the federal right to cure without regard to the state law right to redeem.

Despite the unfortunate statements in the House Report, Congress contemplated preemption of state foreclosure laws for purposes of defining a debtor's right to cure and reinstate. This makes sense because the statutory right to cure and reinstate is a creature of federal bankruptcy law. One of the co-sponsors of the Senate version of the bill, Senator Grassley, made the following statement on the floor of the Senate regarding the proposed legislation:

> Title III of the bill will assist homeowners. Some homeowners attempt to prevent their homes from being foreclosed upon, even though a bankruptcy court [sic] has ordered a foreclosure sale. There may be several months between the court order and the foreclosure sale. Section [1322(c)(1)] will preempt conflicting State laws, and permit homeowners to present a plan to pay off their mortgage debt until the foreclosure sale actually occurs.[22]

[21] H.R. Rep. No. 835, 103d Cong.2d Sess. 52 (1994), 1994 U.S.C.C.A.N. 3340.

[22] 140 Cong. Rec. S14462 (daily ed. October 6, 1994) (floor statement of Sen. Grassley) (*quoted in* 232 B.R. at 97).

Senator Grassley's original version of the legislation tracked a debtor's right to cure and reinstate the mortgage with the debtor's state law right to redeem the property.[23] "Congress's rejection of the Senate bill in favor of the current language of § 1322(c)(1) is telling."[24] Congress intended to leave the state court right of redemption out of the picture and focused instead on setting a bright-line rule for defining a debtor's federal right to cure and reinstate.

More importantly, the statute itself says nothing about the right to redeem, despite the expansive language in the House Report. The right to redeem is merely "the right to pay [a foreclosure] judgment in cash, not the right to cure and reinstate the mortgage."[25] Debtors in a chapter 7 bankruptcy case have a narrow and qualified right to redeem tangible personal property under 11 U.S.C. § 722. Some courts have interpreted the narrow provisions of section 722 as a statutory exclusion of a chapter 7 debtor's right to redeem outside the statute's qualifications.[26] Likewise, Congress's explicit reference to the right to redeem in chapter 7, and the absence of any such reference in chapter 13, suggests that Congress did not intend to use a debtor's state law right to redeem as a reference point for a debtor's federal right to cure and reinstate, or else it would have said so.

The contradictions within the legislative history tend to support the conclusion that, to the extent the legislative history is helpful at all, the intended interpretation of section 1322(c)(1) should align with the only consistent principle between the legislative history and the legislation itself -- that the right to cure and reinstate continues at least through the event of a foreclosure sale.[27] "There is also significant evidence [in the legislative history] that Congress intended that the states were to have the last word in setting the outer limits of the right to redeem."[28] The right to redeem is found nowhere in chapter 13, and was specifically excluded from consideration in determining the outer limits of a debtor's right to cure and reinstate. Also, to the extent section 1322(c)(1) was meant to codify the reasoning and holding of *Glenn*,[29] the Sixth Circuit distinguished a debtor's right to cure

---

[23] *In re Connors*, 497 F.3d 314, 322 (3d Cir. 2007) (citing S. Rep. 103-168, at 21 (1993)).
[24] *Id.*
[25] *In re Reid*, 200 B.R. 265, 267 (Bankr. S.D. Fla. 1996).
[26] *See in re Amoakohene*, 299 B.R. 196, 200 (Bankr. N.D. Ill. 2003) ("Under § 722, a debtor may only 'redeem' tangible personal property.").
[27] *Colon v. Option One Mortgage Corp.*, 319 F.3d 912, 918 (7th Cir. 2003) ("We must conclude that the legislative history, although not entirely conclusive, lends significant support to the view that Congress intended to extend the right to cure at least up to the date of the foreclosure sale"); *cf. Crawford*, 232 B.R. at 98 (concluding that the decision to apply the gavel rule "does not produce a result demonstrably at odds with the legislative intent as to exactly when the cure rights are cut-off because that intent cannot be discerned from the record").
[28] *Colon*, 319 F.3d at 919 (7th Cir. 2003).
[29] *See In re Jaar*, 186 B.R. 148, 151 (Bankr. M.D. Fla. 1995) ("The legislative history of § 1322(c)(1) indicates that it is a codification of the position adopted by the Glenn court, at least in part.").

and reinstate in chapter 13 as a federal right independent and apart from the right to redeem that exists under state law.[30]

Revisiting In re Jaar *and Its Progeny*

The confusion in the legislative history between a debtor's right to cure and reinstate a mortgage and the right to redeem the property, may have partially informed the *Jaar* decision. Judge Glenn footnotes his take on the House Report as follows:

> The question of whether or not Congress intended to allow debtors to cure and reinstate or to redeem during a post-sale redemption period arises under the new statute. The legislative history indicates that it might have: "... if the State provides the debtor more extensive 'cure' rights (through, for example, some later redemption period,) the debtor would continue to enjoy such rights in bankruptcy...." The provisions of the statute may indicate otherwise, however, since it specifies: "sold at a foreclosure sale that is *conducted* in accordance with applicable nonbankruptcy law" (emphasis supplied) rather than "sold at a foreclosure sale in accordance with applicable nonbankruptcy law."[31]

It is unclear to what extent the legislative history actually informs the *Jaar* decision, which does not include any finding related to the ambiguity of section 1322(c)(1). Nonetheless, the court in *Jaar* cites to the legislative history of section 1322(c)(1) and a mortgagor's redemption rights under Florida law, and concludes that the right to cure and reinstate in chapter 13 expires along with the debtor's right to redeem under Florida statute upon issuance of the certificate of sale.

Even if the statutory language is unambiguous, the court in *Jaar* employs the completed-transfer approach by looking to state law to identify when the foreclosure sale process is concluded. But rather than examine what the Florida statutes say about the foreclosure sale process, the court in *Jaar* analyzes the history of redemption rights in Florida. The only discussion in *Jaar* of the foreclosure sale process in Florida is its temporal relationship to the right of redemption:[32]

> Prior to 1971, mortgagors in Florida had the right to redeem from foreclosure judgments after the date of the public sale up to the date the sale was completed by the order confirming the sale. Although the statute providing the judicial sale procedure did not expressly mention redemption, courts had held that there was an inherent right of

[30] *See Glenn*, 760 F.2d at 1435 (finding that the date of the foreclosure sale, at which point the right to cure and reinstate expires, typically *precedes* the expiration date for redemption rights under state law); 760 F.2d at 1436 ("In so ruling we avoid any effort to analyze the transaction in terms of state property law.").
[31] *Jaar*, 186 B.R. at 152 n4 (Bankr. M.D. Fla. 1995).
[32] *Id.* at 153.

BURR FORMAN LLP
results matter

> redemption evolving from the common law which could be exercised at any time prior to entry of an order confirming a sale.[33]

The court then points out that section 45.0315, Florida Statutes, was subsequently enacted "to specifically provide that the right of redemption terminates with the filing of the certificate of sale, unless the foreclosure judgment specifies a later time," and that "[t]he certificate of sale must be set aside for the mortgagor to have any right to acquire the property."[34] The court then concludes that "for the purpose of the mortgagor/debtor paying off the mortgage, through a chapter 13 plan or otherwise, the residence has been sold at the foreclosure sale at the time of the filing of the certificate of sale."[35]

To summarize the statutory analysis of *Jaar*, a property is "sold" for purposes of section 1322(c)(1) when the debtor loses his right to redeem the property upon issuance of the certificate of sale. Although this analysis has a rational basis, it does not answer the initial question posed in *Jaar* case, which "requires a determination of the exact point the property is sold at the foreclosure sale."[36]

Contrary to the holding in *Jaar*, Florida statutes that govern the foreclosure sale process instruct that the certificate of sale is only issued *after* a foreclosure sale is conducted.[37] Nothing in the Florida statutes suggests that a "foreclosure sale" is complete only upon issuance of the certificate of sale. The only direct relationship between a foreclosure sale and expiration of the right of redemption is conceptual, i.e. property may be deemed "sold" when the previous title owner is divested of the right to retain ownership. And the mortgagor is not divested of pure legal title in the property until the certificate of title is issued. It is clear that the actual foreclosure sale and the issuance of the certificate of sale are two distinct and sequential events under the applicable Florida statute, which separates each event into distinct subsections, §§ 45.031(3) and (4). Florida statute also explicitly provides for how and when property is "sold" at a foreclosure sale in language that is identical to that of section 1322(c)(1): "The sale shall be *conducted* at public auction at the time and place set forth in the final judgment."[38] Therefore, the foreclosure judgment controls the exact date and time of the foreclosure sale, and the certificate of sale simply confirms that the foreclosure sale was conducted in accordance with the foreclosure judgment. The text of the certificate of sale itself also follows this logic by consistently referring to the sale in the past tense.[39]

Nonetheless, the court in *Jaar* makes the same conclusion reached in the House Report, i.e. that state law redemption rights should inform the right to cure and reinstate in chapter 13, -- a

---

[33] *Id.*
[34] *Id.*
[35] *Id.* at 154.
[36] *Id.* at 152.
[37] § 45.031(4), Fla. Stat. (2014) ("After a sale of the property the clerk shall promptly file a certificate of sale . . . .").
[38] § 45.031(3), Fla. Stat. (2014) (emphasis added).
[39] § 45.031(4), Fla. Stat. (2014).

BURR · FORMAN LLP
results matter

conclusion previously rejected in the *Glenn* decision, which held that the right to cure and reinstate in chapter 13 should not be determined with reference to state law rights.

The court in *Jaar* also makes no mention of the Eleventh Circuit's decision in *Smith*. Instead, the court in *Jaar*, based upon the equivocation of the House Report, suggests that *Glenn* may or may not have been abrogated by section 1322(c)(1) to the extent the *Glenn* decision rejects referencing state law in defining the debtor's right to cure and reinstate. Therefore, the same may hold true of *Smith*. Again, any departure from *Glenn* and *Smith* appears to be a product of the confusing legislative history of section 1322(c)(1) (which pays lip service to *Glenn* but then suggests that the right to cure and reinstate may extend beyond a foreclosure sale to coincide with the right of redemption under state law), rather than an analysis of the statutory language itself, which is not so expansive as the House Report suggests.

One year after the *Jaar* decision, Judge Mark issued an opinion adopting *Jaar* under a similar scenario in the Southern District of Florida.[40] In *Reid*, the court asked the same initial question as in *Jaar*: at what point in time during the foreclosure process is a property "sold" for purposes of section 1322(c)(1)?[41] Agreeing with the conclusions made in *Jaar*, without further statutory analysis, the *Reid* court held that property is "sold" for purposes of section 1322(c)(1) when the certificate of sale is issued.

However, unlike the *Jaar* decision, the *Reid* decision distinguishes between the right to cure and the right to redeem. In *Reid*, the debtor argued that *Jaar* should not apply because the foreclosure judgment in *Reid* extended the debtor's right to redeem the property beyond the issuance of the certificate of sale, as allowed under § 45.0315, Florida Statutes.[42] The *Reid* court astutely points out that the debtor's right of redemption under § 45.0315, Florida Statutes, has no effect on the debtor's right to cure and reinstate under § 1322(c)(1) of the Bankruptcy Code -- "the redemption right was simply the right to pay the judgment in cash, not the right to cure and reinstate the mortgage."[43] The court cites to the Eleventh Circuit's decision in *Smith* for the proposition that a debtor armed only with redemption rights has no ability to cure and reinstate a mortgage through a chapter 13 plan.[44] "Thus, even if Debtor retained redemption rights after the sale because of language in the Final Judgment, it was too late for her to cure and reinstate her mortgage in this Chapter 13 case."[45]

As pointed out in *Reid*, the right of redemption under § 45.0315 may extend beyond the issuance of the certificate of sale, if allowed in the foreclosure judgment. In other words, Florida statute does not set the expiration of the right of redemption at the issuance of the certificate of sale, as

---

[40] *In re Reid*, 200 B.R. 265, 267 (Bankr. S.D. Fla. 1996).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* (*citing In re Smith*, 85 F.3d 1555, 1560 (11th Cir. 1996))
[45] *Id.*

suggested in *Jaar*. Instead, it only guarantees that the right of redemption shall not expire sooner. Therefore, the conclusion in *Jaar* is ironically undermined by the second part of the *Reid* decision -- if the right of redemption may extend beyond the issuance of the certificate of sale, then the certificate of sale may not mark the conclusion of the foreclosure sale process for purposes of section 1322(c)(1), under the reasoning in *Jaar*. Moreover, the irony in the interplay between *Jaar*, *Reid*, *Glenn* and *Smith* is that *Reid* appears to take an inconsistent position from *Jaar* on the continued viability of *Smith* on whether the state right of redemption is the measure of the federal right to cure, which is also the issue that forms the basis of *Jaar*'s departure from the holdings in *Smith* and *Glenn* on the expiration date of the right to cure, to which *Reid* is in agreement with *Jaar*.

Revisiting the Hypothetical Case: Policy Concerns

When applying the reasoning and holding in *Jaar* to the hypothetical case presented at the beginning of this article, it is apparent that the public auction, rather than the certificate of sale, should be the point at which a debtor's right to cure and reinstate should expire, whether or not section 1322(c)(1) is ambiguous and whether or not one looks to pre-enactment case law or Florida statute to determine the point in time when property is "sold at a foreclosure sale." Whether one calls applies the gavel rule, the completed-transfer, or a simple, plain reading of the text of section 1322(c)(1), the exact point in time when property is sold at a foreclosure sale in Florida is explicitly set forth in section 45.031(3), Florida Statutes, as the date and time set forth in the foreclosure judgment. This is a date set in stone, unless the foreclosure court enters a separate order cancelling the sale, or the clerk of court cancels the sale for failure of the mortgagee to comply with requirements in the foreclosure judgment, e.g. failure to publish the required notice of sale. These cancellations are published in a court order or in a docket entry, to avoid any question as to the time and date of scheduled foreclosure sale.

Of course, the problems posed in the hypothetical case do not arise in the cases of *Jaar* and *Reid*, which involve debtors filing chapter 13 petitions *after* the issuance of the certificate of sale. In effect, the courts in *Jaar* and *Reid* are correct in that the right to cure and reinstate should not extend beyond the issuance of the certificate of sale. However, the holdings in *Jaar* and *Reid* needlessly extend the right to cure and reinstate to the issuance of the certificate of sale, whereas the right should only have been extended to the date and time of the public auction as set forth in the foreclosure judgment. As illustrated below, none of the underlying policies of *Jaar* would be undermined by using the date and time of the public auction, as set forth in the foreclosure judgment, as the determinative point in time. On the other hand, the unintended consequence of extending the right to the certificate of sale is that application of *Jaar* to the hypothetical case would undermine some of the policies Judge Glenn sought to uphold, and which were designed to address the policy concerns outlined in the *Glenn* decision, later adopted by the Eleventh Circuit in *Smith*.

Below, in italics, are the policies underlying the decision in *Jaar* to make the certificate of sale, rather than the date and time of the public auction set forth in the foreclosure judgment, the expiration date for the right to cure and reinstate. Each policy is followed by the reason why such policy is undermined in the hypothetical case of Borrower filing a chapter 13 petition after the public auction but prior to issuance of the certificate of sale.

"*1. This is the point under state law when the mortgagor's equity of redemption is divested and the mortgagor's ability to reacquire the property terminates. Even objections to the amount of the sale do not affect the purchaser's title.*"[46] This is not necessarily true. As allowed by § 45.0315, Fla. Stat., and pointed out in *Reid*, the mortgagor's right to redeem may extend beyond the issuance of the certificate of sale if provided for in the foreclosure judgment. In such a case, the purchaser's title will be subject to risk even after the certificate of sale is issued. Moreover, extending the right to cure and reinstate beyond the public action actually creates greater risk for a purchaser. The right to cure and reinstate under chapter 13 is a much more generous right for the mortgagor than the right to redeem, and more likely to be exercised. If the right to cure and reinstate expires at the public auction, the risk to the purchaser's title will decrease substantially considering the unlikelihood that the mortgagor will attempt to redeem the property prior to issuance of the certificate of sale (especially, if the mortgage has not already filed a chapter 13 petition and plan to attempt a cure and reinstatement).

"*2. Sections 1322(b)(2) and 1322(c)(1) strike a balance. The rights of home mortgagees cannot be modified, but despite this a debtor may cure and reinstate a mortgage until the property is sold. Extending the mortgagor's ability to reinstate the mortgage past the last point when under state law the mortgagor may redeem the property from the foreclosure would frustrate this balance.*"[47] This policy would not be undermined, and would only be further promoted, by limiting the mortgagor's ability to cure and reinstate to the date of the public action.

"*3. This is the point where third parties may become involved. A mortgagee is a consensual lender. Requiring the mortgagee to accept a cure through a chapter 13 plan does not alter the mortgagee's basic character as a lender. A purchaser at a foreclosure sale must pay cash, and becomes an owner. He or she may be purchasing the property for development, for investment, for management, for ownership, or for any number of reasons. The possibility that these reasons may be frustrated by the requirement of becoming a non-consensual lender would have a substantial chilling effect on foreclosure sales, which is ultimately detrimental to both the mortgagee and the mortgagor.*"[48] Third parties are not involved in the issuance of the certificate of sale; they are only involved in the public auction, and any delay in the issuance of the certificate of sale after the auction only increases the possibility that the mortgagor will file a chapter 13 petition to cure and reinstate the

---

[46] 186 B.R. at 154.
[47] *Id.*
[48] *Id.*

mortgage. Any delay also increases any chilling effect on foreclosure sales by increasing the possibility that the sale will be undone by an intervening bankruptcy petition. On the other hand, setting the date and time of the sale, as published in the foreclosure judgment, as the expiration of the mortgagor's right to cure and reinstate would create a public auction process free of any risk or chilling effect because the right would have expired just prior to the beginning of the auction.

"*4. There is no surprise. There need be no race to the courthouses. A foreclosure action must be prosecuted, a judgment must be obtained, and the sale must be set and advertised. The mortgagor has a considerable amount of time to seek refinancing, negotiate, defend the foreclosure, and decide whether or not to seek the protections of bankruptcy.*"[49] To the contrary, this policy is undermined by allowing a debtor to cure and reinstate a mortgage until the issuance of the certificate of sale. On the other hand, this policy would only be further promoted if the right to cure and reinstate a home mortgage is curtailed to a predictable date and time, such as that set forth in the foreclosure judgment. From the perspective of the courts in *Jaar* and *Reid*, the certificate of sale has already been issued, so it has become "predictable." However, from the perspective of a participant in the public auction, the only date and time that is predictable is the date and time of the sale set forth in the foreclosure judgment. In contrast, the date and time of issuance of the certificate of sale, which could be issued at any point in time *after* the public auction concludes, is the only potential surprise for participants in the auction.

"*5. This is a clear, identifiable point in the foreclosure process. Date and time stamps of public officials show the time of filing of a certificate of sale, and the time of filing of a petition in bankruptcy.*"[50] The reasons set forth in response to the previous policy apply equally as well to this policy. From the perspective of the participants in the public auction, as opposed to the hindsight of the courts, the only clear, identifiable point in the foreclosure process is the date and time of the public auction set forth in the foreclosure judgment. The date and time of the sale published in the foreclosure judgment is also equally clear and identifiable for purposes of determining whether a bankruptcy petition has been previously or subsequently filed.

"*6. In Florida, the filing of the certificate of sale, rather than the acceptance of the high bid at the public bidding, is the conclusion of the foreclosure sale. This is the clerk's certificate that the sale has been advertised, the public bidding conducted, and the proceeds of the sale retained for distribution in accordance with the court's order. It is also the point in the Florida foreclosure process which marks the beginning of the period to object to the sale and the beginning of the period to object to the value established by the sale, as well as the expiration of the right of redemption.*"[51] The "conclusion of the foreclosure sale" is not the operative point in time referenced in the statute. The "conduct of the foreclosure sale" is the operative point in time under section 1322(c)(1). The

[49] *Id.*
[50] *Id.*
[51] *Id.*

conclusion of the sale would be a meaningful point in time, if there were no direction in Florida law as to when a sale is "conducted." Under § 45.031(3), Fla. Stat., the foreclosure sale is "conducted" at the time and date set forth in the foreclosure judgment. The courts in *Jaar* and *Reid* are correct that the "conclusion" of the foreclosure sale is only discernible with reference to the certificate of sale, which is an important step in the foreclosure process. However, the only important step for purposes of section 1322(c)(1) is the point in time when the property is "sold at a foreclosure sale that is conducted in accordance with nonbankruptcy law." Under applicable Florida statute, the foreclosure sale is clearly and unmistakably "conducted" at the time and date set forth in the foreclosure judgment.

Conclusion

Since the *Smith* decision, the Eleventh Circuit has not revisited the issue of when a home is sold at a foreclosure sale for the purpose of defining a debtor's right to cure and reinstate. Given the foregoing analytical and policy considerations at issue in *Jaar*, and the pervasive adoption of *Jaar* among Florida bankruptcy courts, there is an immediate need for the Eleventh Circuit to revisit the *Smith* decision. Given the continued backlog in the clerk's offices, and resulting delays in the issuance of certificates of sale (in addition to the growing savviness of debtor attorneys in avoiding foreclosure sales), the opportunity for a change in the law may be fast-approaching.

In addition, bankruptcy courts in Florida that wish to part from the reasoning or holding in *Jaar* in a case similar to the hypothetical case described in this article should feel free to do so, as *Jaar* and its progeny are factually distinguishable in the most important ways, including the unintended consequence of applying the *Jaar* decision in a way that undermines its important policies. To the extent that *Glenn*, and therefore *Smith,* has been codified through the enactment of section 1322(c)(1), a possibility suggested in both *Jaar* and *Reid*, then litigants should be arguing that *Smith* is still controlling in the Eleventh Circuit. Even so, the *Jaar* decision is only persuasive authority, and as such, deserves closer analysis and discernment in its application, a goal this article will hopefully achieve.

Jonathan M. Sykes

Associate - Orlando, Florida

PH: (407) 540-6636 / jsykes@burr.com