ORAL ARGUMENT – 12/6/00
00-0250
HOLY CROSS CHURCH V. WOLF

HAYS: Holy Cross Church of God in Christ took out a $140,000 mortgage on its property. The FDIC acquired the assets of its lender bank, sorted through the notes, and eventually sold the note of fault to sale. At that entered the private market place.

So what's before the court today is an ordinary note accelerated by an ordinary private party. A few after market sales later, Mr. Wolf purchased the note for $5,000 plus a commission. And that _____ to the court the question before it, whether an assignee of an assignee of an assignee of a note that happened to once be owned by the FDIC gets the benefit of the extended limitations period granted by FIRREA?

BAKER: Don't we have a preliminary issue to determine which one of the two statutes of limitations apply?

HAYS: Yes.

BAKER: Because it does make a difference on what the accrual date of the action is. Isn't that correct?

HAYS: In this case, the question the Tyler CA raised was whether it ever accrued at all.

BAKER: But whether you answer that question yes or no what statute applied, first you have to decide whether there was an accrual date and when it was. Do I understand from the facts that there was never a suit or a claim on the note itself involved in this litigation by Mr. Wolf, and that all that we have is his foreclosure and the church's opposition to the foreclosure itself as being barred by limitations. Is that correct?

HAYS: That's correct. The church obtained a TRO barring foreclosure the morning it was set.

BAKER: So there's no deficiency or anything about the note per se involved. So the preliminary question is, How do we determine the accrual rate?

HAYS: The claim Mr. Wolf is seeking to pursue is foreclosure on the note. To foreclose a note, you must accelerate it first. And in the record is an affidavit from the attorney who accelerated the note in 1994 stating that he did so accelerate it, and proving up copies of the notice of acceleration and notices of foreclosure.

BAKER: And the Tyler court treated what appears to be in the papers the motion for summary judgment and the response that the operative date of August 15, 1994, which is the date of the letter that says we're exercising our right to accelerate, as a legal question rather than a fact question.

HAYS: It did. And I believe that the Tyler CA was incorrect in even reaching that question. In the summary judgment procedure the parties expressly agreed as to the date of acceleration. And rule 166(a)(c) and this court's precedent or the appellate courts from going behind parties agreements to narrow the issues at summary judgment...

BAKER: I understand that. But does that answer the question, Were they right in saying well it's a question of law rather than a question of facts, so we're not bound by the August 15, 1994 date? Does it make any difference?

HAYS: What Tyler didn't do a very good job of was breaking down what it meant by that. The question of accrual is a question of law. The question of law applicable here is that acceleration amounts to accrual under the statute. And the case law in Texas is such that if you have an unequivocal declaration of acceleration followed by an affirmative step to enforce that declaration, then you have acceleration.

BAKER: Well why do you have to have affirmative action to effectuate an acceleration in the context of accelerating the note itself? Does that mean you have to sue on the note?

HAYS: No. And that's exactly what Tyler, I think, thought Holy Cross should have done.

BAKER: Holy Cross didn't own the note. Mr. Wolf owned the note.

HAYS: The CA confused the facts necessary for foreclosure with the facts necessary for acceleration. Holy Cross moved for summary judgment under §16.035(b) of the Civil Pract. & Rem Code. That sets the limitations period between accrual and foreclosure. And there's a sentence in the CA's opinion criticizing Holy Cross for not showing any evidence that foreclosure ever occurred. Well of course the church didn't. That's not the applicable limitations period. Had this been a suit on a deficiency after foreclosure, that would have been the applicable fact for accrual. But it's not.

BAKER: So it's your position that that August 15 date is the operative date for a court to answer the legal question, Is that the accrual date?

HAYS: Exactly.

BAKER: And then having said that, if it is, where do we go from there?

HAYS: Where we go from there is witch statute applies? The federal or the state? And the state applies here because...

BAKER: What about the part where they say you have to have affirmative action to foreclose to make that August 15 date, the operative date.

HAYS: The law in the state is not affirmative action to foreclose. It's affirmative action toward enforcing that acceleration. And a notice of foreclosure is sufficient. And the record also includes...

BAKER: Why do have to have that anyway? What bothers me is if it's accelerated, if the owner of the note does absolutely nothing for more than 4 years it would seem if its accelerated that they are out of court on both the note and the right to foreclose.

HAYS: I think where the confusion in the CA's opinion comes from is some of this case law is pretty old. It dates back...

BAKER: Well they cited about 6 or 7 cases that support their holding that that was a requirement. To effectuate acceleration you had to do something to foreclose.

HAYS: Right. I think the cases Tyler relied on was relying on very old cases that date from a time when real estate practitioners didn't regularly send out a clear cut notice of acceleration. Cases that pre-date this court's decision in Ogden. And in those cases you have a statement by a creditor that wasn't clear if they were really accelerating or only accelerating: if you don't pay me in two weeks. Those kinds of notices. And that's where the courts were wanting an affirmative step.

BAKER: Okay. Let's assume for your argument then that since both parties agreed that August 15 was an operative date for some purpose and then we apply the law, why doesn't Mr. Wolf get the benefit of the 6-year statute instead of the 4-year statute?

HAYS: Because this claim did not accrue and the state limitations period did not begin to run until after the FDIC sold the note. It's an ordinary note in private hands. If you go with Mr. Wolf's argument that the federal limitations period applies, you would in essence be creating two classes of notes in the market place. One set that get these extra powers because the FDIC once touched them and another set...

BAKER: Well we've already done that haven't we in Jackson v. _______?

HAYS: Not necessarily because there was a strong federal policy...

BAKER: Under those facts we did though didn't we?

HAYS: The reasoning behind Jackson, Holy Cross believes is correct. There is very practical policy reasons for this court to do what it has done and courts across the country have done the same. If you had a note, like this note, either a 4 year or a 6 year limitations period, and FDIC acquired the bank in year 4 and it took it 6 months to a year to sort through those notes, it would be worthless in year 5 unless the next note holder got the federal limitations period. Those concerns aren't present here.

BAKER: Why not? I don't understand why not.

HAYS: Because the taxpayers have already got their money. The note was in the private marketplace. The purposes behind FIRREA's extension is to give the FDIC extra time to sort through the notes and to make the notes more marketable.

BAKER: But at the outset everybody said, Well that just applies to the FDIC, they are the only ones that gets this 6 year deal. So you would have to imply then they are the ones that still have it, can sue, and they've got 6 years. But the question we're talking about now came up and we decided that in Jackson that it's an assignable asset and it goes to the assignee and they get the same right of a 6-year statute. But that was based if I understand on the fact that the note was already in default when it got in the hands of the FDIC. Is that the distinguishing fact here that makes your argument good, the fact that when the FDIC got the note that it was not in default or had not been accelerated?

HAYS: In part, but the word default is used a little too loosely in some of these cases. In the Jackson case itself, the note was in default on the claim the creditors sought to enforce while the FDIC had the note. Thus, the cause of action accrued when the FDIC had the note and the state limitations period began to run and was preempted by the federal limitations period while the FDIC had the note.

BAKER: If it's in accelerated, state limitations is running, the FDIC gets it, they have a 6-year term by federal statute, which is assignable, so that's why the 6-year statute applies.

HAYS: Yes. And the distinction is actually well illustrated by the two federal circuit cases Holy Cross has briefed to this court. The 5th circuit decision, the default occurred after FDIC sold it. Federal interests were served. There wasn't a default. The 6-year limitations didn't apply. apply. In Beckley, the 1st Circuit decision, the facts were a little more unusual. The default had occurred while the FDIC had it, but the guarantor died after the FDIC sold the note triggering a one-year statute of limitations for claims against estates. And both the TC and the appellate court there found that the state interests in its limitations period outweighed the minimal federal interest at that point.

So reading those two cases together, the operative fact is whether the state limitations period began while the FDIC had the note.

PHILLIPS: Once we get past that issue would you get to the others.

HAYS: I will address briefly the two issues the CA raised for us. And that is, whether they can reverse on an issue not presented to the TC. The language of the rule is clear. They cannot. The question then becomes was this issue of accrual presented to the TC because it was a summary judgment based on limitations? It was not. It was in fact expressly agreed to by the parties. The purpose of the summary judgment rule is to let parties narrow down the issues, and if there are no questions of fact, not _______ going to trial and go straight to judgment. And that's what happened in this case, and the appellate courts ought to respect the parties decisions to narrow their issues particularly when the record is as clear as it is in this one, that the agreement was made.

BAKER: Does anything warrant the statement that parties can't agree what the law is, that's the court's prerogative?

HAYS: That's true. But in this case what Tyler did wasn't the law. We have an affidavit from the lawyer who accelerated the note saying, I accelerated it. That's pretty clear evidence of acceleration.

BAKER: No, I mean on the part where Tyler says the parties can't agree when this action accrued because that's a legal question.

HAYS: Let me give you an analogy. Say I sue on a breach of contract and say you've breached the contract because you did not perform X, Y and Z. You answer and say, I don't have to perform X, Y and Z under this contract. We go to summary judgment and let the court decide. The CA reversed this because there was never consideration on the contract. It's a question of law, but we eliminated that issue at the TC. And you know it may be that this court decides it wants to consider - have the appellate courts consider nondisputed questions of law, or it may not. And a difference from that fact example than this case the Tyler CA reversed us on a question of law it invented. There is no requirement that a party show posting and filing of a notice of foreclosure at the courthouse to demonstrate acceleration. The court confused the requirements for foreclosure under the property code for the requirements of acceleration in the case law.

HECHT: Just out of curiosity, did the CA bring up the point in argument?

HAYS: There was no oral argument. The appellant never requested it. And the appellee will not request it again.

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RESPONDENTS

WOLF: I am sorry, but my attorney has not showed up this morning. I don't know where he is. I believe the question that Tyler raised was what happened? Where is the evidence that a foreclosure and acceleration happened? And I believe that that's what they asked for when they remanded it back to the original court. Both lawyers had not brought up evidence that they were continuing negotiations that happened with the church and the note holder. And what I would like to see would be for that to go back to court to discuss what actually happened. I'm not speaking in correct legal terms here, but I believe that the basic question that the CA said was that it doesn't seem to be the law here. They never addressed 4-year or 6-year statute of limitations because I believe it was irrelevant that the church continued to negotiate after the acceleration process had started and the foreclosure process had started. There is nothing in the courthouse that stated that any legal actions happened, and there was evidence in the files that I received from the people I bought my note from that there was correspondence with the church discussing a payout and there was also evidence of continued discussions for a payout. So the reasons that I believe that the foreclosure and acceleration never happened was that they continued to discuss this. And that's why the note was sold again two more times.

And so what I would ask for this court to do is to refuse to hear it and send it back to the original trial so that we can discuss that point that foreclosure and acceleration never happened.

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REBUTTAL

HAYS: Just to sum up, the Tyler CA made several errors in this case. One, reversing on an issue that was not expressly presented to or considered by the TC. Two, even if they could carve out a question of law and the question of acceleration, they are wrong on the way they interpreted it. All that is necessary under Texas law is a notice of acceleration.

There is case law out there that says you need a notice of acceleration and an affirmative step. As I mentioned to Justice Baker before, I believe the CA's opinion get a little murky because of the facts in each individual case.

And finally, I do believe that the federal statute does not apply if there are no federal interest to be served here whatsoever and the state interests shouldn't be trampled when there are no federal interests to be served as well.

The statute provides for the party's ability to reaffirm the note and file that notice with the courthouse. And this happens all the time. If the parties come to an agreement after acceleration, it's simple and any diligent creditor can file a written agreement with the courthouse. That puts other potential bonafide purchasers on notice and the acceleration is undone sort of speak. If they choose to undo the acceleration instead of some other sort of ________.