A BRIEF ANALYSIS OF:
USA v. WARD, 985 F.2d 500 (10th Cir 1993)

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Presented to:

The Oklahoma City Commercial and Banking Lawyers Group
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A BACKGROUND:

The FmHA sought to foreclose its mortgage for over $1 million on a farm where the action was filed when the default under the obligation was over six years old.

The farmer sought either (1) to directly apply the six year federal statute of limitation [28 U.S.C. §2415(a)] to prohibit the foreclosure, or (2) to indirectly apply the same six year federal statute of limitation by invoking the state statute (42 O.S. §23) extinguishing the mortgage lien when the underlying principal obligation is unenforceable.

On September 25, 1979 notes and a mortgage were executed and delivered. In 1980 the indebtedness was accelerated. On November 14, 1983 an injunction was granted against all accelerations and foreclosures by FmHA until its loan deferral procedures were corrected. [Coleman v. Black, 580 F.Supp. 194 (D.N.D. 1984)] FmHA again accelerated the debt on July 16, 1990. Foreclosure was filed on May 15, 1991.

B. HOLDINGS:

1 PLAIN LANGUAGE.

a. The plain language of the statute does not apply to equitable actions such as a foreclosure. [28 U.S.C. §2415(a)]

b. "Time does not run against the sovereign" unless Congress has expressly expressed a statute of limitation. [United States v. John Hancock Mutual Life Insurance Co., 364 U.S. 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960)]

c. Any statute of limitations running against the U.S. must be strictly construed. [Badaracco v. Commissioner, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984)]

2. SEPARATE ACTION.

a. The right to foreclose a mortgage securing a debt is distinct from the right to bring an action for money damages on the note representing the debt. [Cracco v. Cox, 66 A.D.2d 447, 414 N.Y.S.2d 404 (1979)]

b. 28 U.S.C. §2415(a) may cut off a civil action on a note, but the government may still foreclose on the mortgage securing the debt. [Cooper, Curry v. Small Business Administration, 679 F.Supp. 966 (N.D.Cal. 1987); Gerrard v. United States Office of Education, 656 F.Supp. 570 (N.D.Cal. 1987); Westnau Land Corp. v. United States Small Business Administration, 785 F.Supp. 41 (E.D.N.Y. 1992); United States v. Freidus, 769 F.Supp. 1266 (S.D.N.Y. 1991); and United States v. Cooper, 709 F.Supp. 905 (N.D.Iowa 1988)]

3. MONEY DAMAGES.

28 U.S.C. §2415(a), according to legislative history, was only intended to apply to money damages based on contract. [Cracco v. Cox, 66 A.D.2d 447, 414 N.Y.S.2d 404 (1979)]

4. OKLAHOMA FORECLOSURES.

a. A mortgage conveys only a lien interest in the property. [Teachers Insurance & Annuity Association of America v. Oklahoma Tower Associates, Ltd., 798 P.2d 618 (Okla. 1990)]

b. "Thus the government correctly explains, in Oklahoma, a mortgage foreclosure results in an action identified in §2415(c)", which states

"Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."

5. CONTRACT TERMS.

a. The "documents" (which documents?) signed by the farmer waived all "present and future State laws . . . prescribing any other statutes of limitations".

b. 42 O.S. §23 whereby "A lien is extinguished" is a "statute of limitation"

6. FEDERAL PROGRAMS.

a. "The basic reason why the Wards cannot prevail is that federal law governs issues involving the rights of the United States arising under nationwide federal programs." [United States v. Kimbell Foods, Inc., 440 U.S. 715, 725, 99 S.Ct. 1448, 1456-57, 59 L.Ed.2d 711 (1979); United States v. Bellard, 674 F.2d 330, 334 n.6 (5th Cir. 1982); and Cooper, Curry v. Small Business Administration, 679 F.Supp. 966 (N.D.Cal. 1987)]

C. IMPACT:

1. CURATIVE ACT: ANCIENT MORTGAGES.

The State statute allowing third parties to ignore all mortgage liens after they have been of record (without a recorded extension) for 10 years past their maturity date (if shown) or 30 years past their recording date (if no maturity date is shown), 46 O.S. §301, and the related Title Standard no. 13.8 are apparently inapplicable to federal program mortgages.

2. CURATIVE ACT: ANCIENT FIXTURE FILING.

The State statute allowing third parties to treat all fixture filing as extinct after they have been of record for five years past their filing date (without a filed continuation), 12A O.S. §9-401A and §9-403, and the related Title Standard no. 13.9, are apparently inapplicable to federal program fixtures filings.

3. CURATIVE ACT: MARKETABLE RECORD TITLE ACT.

The State statute allowing third parties to ignore essentially all title defects and liens or encumbrances which are behind (i.e., older than) the 30 year "root of title" instrument (i.e., a deed or a decree), 16 O.S. §§71-80, and the related Title Standards no. 19.1 to 19.13, are apparently inapplicable to federal program mortgages.

4. COMMON LAW.

It is unclear whether it was argued that federal or state common law make the mortgage "incidental to" and "dependent on" the underlying debt. This gap was apparently created by the parties looking for positive statutory pronouncements. Therefore, this argument might arise in the future.

5. UNENFORCEABLE DEBTS.

The underlying principal obligation may become extinguished or unenforceable due to at least three causes: (a) satisfaction of the debt through payment, (b) discharge of the debt in bankruptcy and (c) debt becomes unenforceable due to the passage of time (i.e., statute of limitation). It appears that unless the underlying debt is satisfied or the lien is specifically discharged in bankruptcy, the mortgage lien continues indefinitely.

6 FEDERAL v. STATE.

This case continues the tension between state and federal authority over local real property issues. A similar issue concerns whether federal courts and U.S. Marshalls should conform to both state and federal mortgage foreclosure notice provisions. Currently all three federal districts in Oklahoma conform to both sets of rules -- after the Eastern District tried to ignore the State rules for a period of time. Another related matter concerns federal extension of State redemption periods.

7 TYPES OF PROGRAMS.

An unanswered and haunting question is which kinds of mortgages fall into this perpetual lien category: Is every mortgage (or security agreement) to an entity with a "federal sounding" name included? What about sales of government owned property with carry-back mortgages made outside of any specific "program"? How much national loan program involvement is needed? What about federally guaranteed, but not federally funded activities?

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ney" was not a § 1B1.8(a) agreement), *cert. denied*, — U.S. —, 112 S.Ct. 208, 116 L.Ed.2d 167 (1991). We conclude that there was no agreement not to use self-incriminating evidence.[2]

Mr. Evans also contends that there was insufficient evidence to support an upward adjustment of his base offense level for being "an organizer, leader, manager, or supervisor" under § 3B1.1(c). He notes that there is no evidence that he "exercised any authority, direction or control over his ... customer's resale of the [drug] purchased from him." *United States v. Moore*, 919 F.2d 1471, 1477 (10th Cir.1990). On appeal, the government agrees with Mr. Evans and urges us to remand the case for resentencing without the § 3B1.1(c) adjustment. After reviewing the record, we agree with the parties and remand to the district court with an order to vacate Mr. Evans's sentence and resentence him in a manner consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED with an order to VACATE the sentence and resentence in a manner consistent with this opinion.

UNITED STATES of America,
Plaintiff–Appellee,

v.

John WARD and Lowann J. Ward,
Defendants–Appellants.

No. 92–7068.

United States Court of Appeals,
Tenth Circuit.

Feb. 8, 1993.

United States brought action to foreclose its mortgage on real estate securing Farmers' Home Administration (FmHA) loans. The United States District Court for the Eastern District of Oklahoma, H. Dale Cook, J., that action was not time barred. Mortgagors appealed. The Court of Appeals, John P. Moore, Circuit Judge, held that six-year statute of limitations for actions brought by the United States applied only to actions for money damages and did not apply to action by United States to foreclose its mortgage.

Affirmed.

1. **United States** ⇐53(13.1)

Six-year statute of limitations for actions brought by the United States applied only to actions for money damages and did not apply to action by United States to foreclose its mortgage on real estate securing Farmers Home Administration (FmHA) loans. 28 U.S.C.A. § 2415(a).

2. **Limitation of Actions** ⇐11(1)
United States ⇐133

If statute of limitations is to run against the United States, it must be strictly construed.

3. **Mortgages** ⇐137

In Oklahoma, mortgage conveys only lien interest in property to mortgagee; only after foreclosure proceedings does mortgagee obtain title and right to possession of mortgaged property.

4. **Federal Courts** ⇐433

Federal law governs issues involving rights of United States arising under nationwide federal programs.

5. **Federal Courts** ⇐424

Federal law, not Oklahoma law, applied to determination of appropriate stat-

2. Mr. Evans's reliance on our holding in *United States v. Shorteeth*, 887 F.2d 253 (10th Cir.1989), is misplaced. We there held that where the government promised not to institute separate federal prosecutions against the defendant "'for conduct and acts committed by her related to information she provides the Government during ... debriefings,'" § 1B1.8(a) required the government to expressly state that such information could be used in sentencing. *Id.* at 256. Because the government in this case did not make *any* agreement not to use self-incriminating information, it had no occasion to expressly reserve the right to use the information for sentencing.

ute of limitations for United States' action to foreclose its mortgage on real estate securing Farmers' Home Administration (FmHA) loans.

. Jeffrey A. Knishkowy (Robert Huddle, Office of the Gen. Counsel, U.S. Dept. of Agriculture; and John Raley, U.S. Atty., and Ralph F. Keen, Asst. U.S. Atty., Muskogee, OK, with him on the briefs), Washington, DC, for plaintiff-appellee.

George W. Braly of Braly & Braly, Ada, OK, for defendants-appellants.

Before MOORE, BRORBY, and EBEL, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

The single issue presented in this appeal is whether the six-year statute of limitations established in 28 U.S.C. § 2415(a) applies to an action by the United States to foreclose its mortgage on real estate securing government loans. The district court held § 2415(a) applies only to actions for money damages brought by the United States and granted summary judgment in the government's favor ordering foreclosure on mortgages securing loans in excess of $1 million on which borrowers, John Ward and Lowann J. Ward, never made any payment. We agree with the conclusion reached by the district court and affirm.

On September 25, 1979, the Wards executed and delivered installment notes to the government evidencing loans exceeding $1 million they received from the Farmers Home Administration (FmHA). The notes were secured by various mortgages. The Wards made no payments on the notes after September 25. In 1980, the FmHA accelerated the indebtedness under express acceleration clauses in the notes. However, on November 14, 1983, an injunction was issued in *Coleman v. Block*, 580 F.Supp. 194 (D.N.D.1984), prohibiting the FmHA from accelerating loans and instituting foreclosure actions until it corrected its loan deferral procedures. On June 20, 1984, the FmHA reversed the acceleration of the Wards' debt; however, after FmHA implemented the new procedures required by *Coleman*, it again accelerated the Wards' indebtedness on July 16, 1990. The government brought the underlying foreclosure action on May 15, 1991.

[1] The Wards moved for summary judgment on the foreclosure based on the six-year statute of limitations in 28 U.S.C. § 2415(a).[1] The government cross-moved arguing § 2415(a) did not apply to foreclosure actions. Alternatively, the government urged the *Coleman* injunction and its subsequent action to "de-accelerate" the loans tolled the statute of limitations in any case; therefore, the 1991 foreclosure action was timely.

Specifically eschewing the tolling issue, the district court instead relied on subsection (c) of 28 U.S.C. § 2415 which states:

> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

The explicit language in § 2415(a) limiting its effect to "every action for money damages," when combined with subsection (c), satisfied the district court that § 2415(a) does not bar the government's foreclosure action. In so deciding, the court recognized that no circuit court has addressed the question, although at least four district court decisions have now so held. *Westnau Land Corp. v. United States Small Bus. Admin.*, 785 F.Supp. 41, 43 (E.D.N.Y.1992); *United States v. Freidus*, 769 F.Supp. 1266, 1273 (S.D.N.Y.1991); *United States v. Copper*, 709 F.Supp. 905 (N.D.Iowa 1988); *Gerrard v. United States Office of Educ.*, 656 F.Supp. 570 (N.D.Cal.1987).

The Wards contend the court's conclusion will permit the United States to fore-

1. The pertinent part of that section reads:
> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law....

close on a mortgage 'a millennium from now." Forthrightly conceding that all published cases remain contrary to their position, the Wards claim those decisions "are all misconceived" and should not be followed. They urge because our review is de novo we should adopt the Oklahoma statute of limitations for mortgage liens as a matter of national policy.

In Oklahoma, the Wards state, it is well settled:

> A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation.

Okla.Stat. tit. 42, § 23 (1991). The Wards interpret this section to invoke 28 U.S.C. § 2415(a) as the "provision[ ] of civil procedure" which triggers the running of the time during which a mortgage can be foreclosed by the United States in Oklahoma. As a consequence, they argue, the mortgages the government sought to foreclose have lapsed and are unenforceable.

They further contend Oklahoma law must prevail because there is no federal law to govern mortgage foreclosure actions. The Wards argue § 2415(c) offers no solace because a mortgage foreclosure neither establishes title nor a right of possession of real or personal property.

The Wards claim under Oklahoma law a mortgage foreclosure suit causes property to be sold at public auction and applies the proceeds to the underlying, *existing* debt. They deduce the mortgage is "incidental" to the debt, and the debt here has been extinguished by operation of law; therefore, the government's action cannot be termed an action to establish title or right of possession.

[2] In response, the government argues, first, the plain language of § 2415(a) makes it inapplicable to foreclosure which is an equitable action. The maxim, time does not run against the sovereign, combined with the principle that the United States is not bound by a statute of limitations unless Congress has explicitly expressed one, *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960), also undergirds the plain language to preclude implying its extension to equitable actions, the government states. Finally, if a statute of limitations is to run against the United States, it must be strictly construed. *Badaracco v. Commissioner*, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984). We agree with these general principles.

Second, the weight of authority supports the district court's conclusion § 2415(a) does not bar the foreclosure action, the government states, citing *Cracco v. Cox*, 66 A.D.2d 447, 414 N.Y.S.2d 404 (1979). In holding the FmHA was not time-barred from foreclosing on its mortgage, the *Cracco* court observed, "it is a long-standing rule that the right to foreclose a mortgage securing a debt is distinct from the right to bring an action for money damages on the note or bond representing the debt." *Id.*, 414 N.Y.S.2d at 405. Similarly, *Copper, Curry v. Small Bus. Admin.*, 679 F.Supp. 966 (N.D.Cal.1987), and *Gerrard*, relied upon by the district court, held § 2415(a) may cut off a civil action on a note, but the government may still foreclose on the mortgage securing the debt. Again, we agree.

Third, the government cites legislative history, also noted in *Cracco*, in which the Attorney General informed the Senate, "The general rule is that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute." S.Rep. No. 1328, 89th Cong. 2d Sess. 2 (1966), *reprinted in* 1966 U.S.Code Cong. & Admin.News 2502, 2512–13. The bulk of the legislative history underscores § 2415(a) was intended to apply to money damages based on contract alone. This reading is buttressed by § 2415(c), the government argues, highlighting the contrast to money damages.

[3] Fourth, in Oklahoma, a mortgage conveys only a lien interest in the property to the mortgagee, the government asserts. *Teachers Ins. & Annuity Ass'n of Am. v. Oklahoma Tower Assocs. Ltd.*, 798 P.2d 618 (Okla.1990). Only after foreclosure proceedings does the mortgagee obtain title and the right to possession of the mort-

gaged property. Thus, the government correctly explains, in Oklahoma, a mortgage foreclosure results in an action identified in § 2415(c).

We believe the argument advanced by the Wards is merely facile and fails to appreciate a number of factors. First, as noted by the government in oral argument, the documents signed by the Wards upon which the foreclosure is predicated, contain a clause in which they agreed,

> the Government will not be bound by any present or future State laws, ... (b) prohibiting maintenance of an action for a deficiency judgment or limiting the amount thereof or the time within which such action may be brought, (c) prescribing any other statute of limitations....

The Wards attempt to avoid the clear implication of this agreement by arguing Okla. Stat. tit. 42, § 23, is not a "statute of limitations." The contrary is evident, however, because the clear import of the statute is to limit the time within which an Oklahoma mortgage can be enforced.

[4, 5] Ultimately, it is unnecessary to even reach this point. The basic reason why the Wards cannot prevail is that federal law governs issues involving the rights of the United States arising under nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 725, 99 S.Ct. 1448, 1456–57, 59 L.Ed.2d 711 (1979); *see also United States v. Bellard*, 674 F.2d 330, 334 n. 6 (5th Cir.1982). Consequently, because the underlying loans were made to the Wards by the Farmers Home Administration of the Department of Agriculture and emanated from the Farm and Rural Development Act of 1949, a nationwide federal program, the government is not affected by Oklahoma's lien expiration law. *See Copper*, 709 F.Supp. at 907. Thus, if the government is barred from the enforcement of the mortgage, the limitation must come from federal law.

No such limitation exists. As the trial court noted, 28 U.S.C. § 2415(a), by its own unambiguous terms does not apply to mortgage foreclosures. When § 2415(a) is read in connection with § 2415(c), as it must, there is no room for argument. Because the district court committed no error, its judgment is AFFIRMED.

Rhea Dawn JONES, Plaintiff–Counter–Defendant–Appellee/Cross–Appellant,

v.

NEW YORK LIFE & ANNUITY CORPORATION, a Delaware corporation, Defendant–Counter–Claimant–Appellant/Cross–Appellee.

Nos. 91–4184, 91–4202.

United States Court of Appeals, Tenth Circuit.

Feb. 10, 1993.

Life policy beneficiary brought suit against insurer to recover benefits. The United States District Court for the District of Utah, Bruce S. Jenkins, Chief Judge, held for beneficiary but denied insured's claim for punitive damages. On appeal by both parties, the Court of Appeals, McWilliams, Senior Circuit Judge, held that, under Utah law, where applicant gives verbal responses to insurer's agent, who then fills out application, applicant has duty to read application before signing it to make certain his verbal responses have been correctly recorded, and applicant is, by law, conclusively presumed to have read application and his beneficiary is bound by contents thereof.

Reversed, vacated and remanded.

1. Insurance ⇐253

Under Utah law, misrepresentations and omissions in application for insurance will not prevent recovery under policy unless such are fraudulent, material either to acceptance of risk or to hazard assumed, or insurer would not have issued policy if true