

Notes on S/L on enforcement actions on certificates of delinquency.

Prepared for \*\*\*\*\*

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### **ISSUE:**

*Tax bills have a 10 year statute of limitations within which one must collect the tax. (KRS ..... ) Sometimes our bills are 8-9 years old when suit was filed and by the time the case settles (just before sale) the limitations period has expired. So the question becomes, if plaintiff settles his case and leaves us to pursue our bill, does the S/L prevent us from doing so? Could we re-file the case as a plaintiff or do we need to preserve the initial case and proceed as a Cross-Plaintiff?*

*I suspect part of the answer may be whether or not we issued summons on our claims and if so, when we issued the summons.*

### **SHORT ANSWER:**

The 11-year limit on filing an enforcement action under KRS § 134.420 *et seq.* (see KRS § 134.546 (1)) would in all likelihood bar your re-filing the case as a plaintiff.

Moreover, you appear to have an affirmative duty under Kentucky law to protect your clients' interests by (1) asserting a cross-claim and/or counterclaim with your Answer and (2) ensuring that a summons has been timely served on the named parties.

### **ANALYSIS**

#### **1. KRS 134 itself:**

You will not be surprised to learn that I found no KY cases in the Westlaw database that directly address this statute of limitations issue for the various subsections of KRS 134.

(There are cases that touch on the front end, i.e., the time *before* which a claim cannot be brought, but no cases that address the expiration of the S/L period during the pendency of a foreclosure suit.)

#### **2. Filing the Cross-Claim/Service of Process Issues**

You are correct that the issuance of the summons appears to be key. I found no case law to suggest that, once the S/L period has expired, a claim to enforce a lien could be revived, absent the sort of S/L tolling situations discussed in Section 3, below. By contrast, there are, as you can easily imagine, plenty of cases to cite for the proposition that statutory limitations on the period for filing will bar claims once the delineated filing period has passed.

Thus, the answer to your question, “*If plaintiff settles his case and leaves us to pursue our bill, does the S/L prevent us from doing so?*” is **very likely, yes**.

Further, under KRS § 426.006, you appear to have an **affirmative duty to file a cross-claim** with your answer:

The plaintiff in an action for enforcing a lien on property shall state in his petition the liens held thereon by others, making them defendants; and may ask for and obtain a judgment for a sale of the property to satisfy all of said liens which are shown to exist, though the defendants fail to assert their claims. **Such defendants shall not, however, be allowed to withdraw or receive any of the proceeds of such sale, until they have shown their right thereto by answer and cross claim, which shall be asserted as provided in the Rules of Civil Procedure.**

KRS § 426.006 (emphasis added).

There only case that I could find addressing this cross-claim/summons issue in the foreclosure context in detail is the unpublished decision of Conseco Finance Servicing Corp. v. Hurstbourne Healthcare, LLC, Not Reported in S.W.3d, 2004 WL 2755850 (Ky.App.2004) (NO. 2002-CA-001757-MR) (attached to this e-mail).

In Conseco, the foreclosing entity filed suit against the debtors, the first mortgage holder (Conseco) and an investing group holding a judgment lien (HCC). HCC filed a cross-claim against Conseco, but did not cause a summons to be issued. The court held that a cross-petition is an initiating document under CR 4.01 and must be served according to the Rules of Civil Procedure, meaning specifically that a **summons must be issued with the cross-claim**.

Also, I’ve attached another unpublished opinion that concerns **failure to properly amend a cross-claim** and/or counterclaim to include all liens held by the investor. Tax Ease Lien Investments 1, LLC v. Cumberland Valley Nat. Bank and Trust Co., Not Reported in S.W.3d, 2010 WL 2428649 (Ky.App.2010) (NO. 2009-CA-001138-MR).

I also looked through the “collections” area of case law to see if I could find anything relevant to the issue of an entity enforcing a debt collection when the S/L has expired while some other legal proceeding was going on, but I didn’t find anything on point. I could spend more time on that issue if you want me to, but for the scope of this assignment I’ve stopped looking.

### **3. Tolling the S/L**

I looked for cases that might address tolling the S/L during the pendency of any related legal proceeding, including a foreclosure action, but didn’t find anything that would

suggest the circumstances under which such tolling might apply on the sort of facts you're proposing (e.g., tolling where damages are not yet fixed and final; tolling under the discovery rule; federal or criminal procedure pending, etc.)

However, if the plaintiff/foreclosing entity has settled its claim with the lead defendant/taxpayer, but the time for filing an enforcement action under KRS 134 has passed, you might be able to make an equitable estoppel/equitable tolling argument that your client should be allowed to enforce the debt or the lien under KRS 134.420, although these "equitable" arguments usually require some kind of deceit by one of the parties or other special circumstances.

Of course, if a foreclosing entity ever fails to name your lien-holding client as a defendant, you would have a cause of action under KRS §§ 426.006 & 426.690.

#### **4. The relevant KRS "Statute of Limitations" Provisions:**

For your reference, the relevant S/L portions of the KRS are listed here:

##### **KRS 134:**

KRS § 134.546 (1):

**Any action to collect any amount due on a certificate of delinquency or personal property certificate of delinquency may be brought at any time after the passage of one (1) year from the date the taxes became delinquent, and shall be brought within eleven (11) years of the date when the taxes became delinquent.**

**KRS 413** (deals generally with statutes of limitations):

KRS § 413.250

"An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action."

##### **CR 3.01 (Commencement of action)**

"A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

Cases decided under CR 3.01 make clear that the summons has to be served in good faith before the expiration of the statutory limitation on the filing of actions. A clerk's or sheriff's error or delay in service of the summons might toll the S/L, but otherwise the S/L almost always applies (absent the sort of tolling arguments discussed in Section 3, above)