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Financial Services Litigation Update

Foreclosure Abuse Prevention Act – Due Process Considerations

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On December 30, 2022, Governor Hochul signed the so-called "Foreclosure Abuse Prevention Act" (S.5473)(A.7737) ("FAPA") into law. FAPA, which took effect immediately, was introduced by the Legislature to address purported abuses of the judicial foreclosure process by foreclosing plaintiffs. According to the Legislature, these abuses were exacerbated by the courts, warranting legislative abrogation of several Appellate Division decisions and, most notably, the Court of Appeals' November 21, 2021 *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1 (2021) decision. Among the critical changes, the law alters the impact of voluntary discontinuances, sets out new rules for successive foreclosure actions, changes how the statute of limitation is applied, and creates a new and significantly narrower version of the savings statute applicable to mortgage foreclosure cases.

Importantly, the law also expressly states that it applies retroactively, even though mortgagees have reasonably relied on settled Appellate Division and Court of Appeals case law in extending assistance to distressed mortgagors, advancing monies on their behalf for real estate taxes, insurance and other things. The law's express claim to apply retroactively while ignoring mortgagees' substantive due process rights is concerning. In short, under the new law, vested property rights conferred by final judgments of foreclosure and sale are in jeopardy. For example, the retroactive application of FAPA could result in dismissal of a complaint on statute of limitations grounds, thereby voiding a judgment and rendering a previously enforceable mortgage unenforceable.

Court of Appeals case law is instructive in analyzing whether the retroactive application of FAPA can survive a constitutional challenge. In 2020, the Court of Appeals reviewed and ultimately struck down retroactive application of another housing-related statute in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332 (2020). In *Regina*, the High Court evaluated the constitutionality of applying certain amendments to the Rent Stabilization Law ("RSL") included in the Housing Stability and Tenant Protection Act ("HSTPA") retroactively. Specifically, the High Court addressed the retroactive application of part F of the HSTPA, which extended the statute of limitations for certain violations of the RSL; altered the method for determining legally regulated rent for overcharge purposes; and expanded the nature and scope of a landlord's liability in rent overcharge cases.

The High Court reasoned that if applied retroactively these amendments would impair substantive rights possessed by landlords, increase their liability for past conduct, and impose new duties with respect to transactions already completed. The Court of Appeals noted that it is precisely because retroactive legislation has the potential to undermine substantive rights and triggers fundamental concerns about fairness that it is viewed with "great suspicion," and a presumption against retroactivity is "deeply rooted" in U.S. Supreme Court jurisprudence.

With these considerations in mind, the High Court articulated a framework for evaluating whether retroactive application of a newly enacted statute comports with due process protections in the State and Federal Constitutions. To comport with due process, all legislation, whether prospective or retroactive, must be supported by "a legitimate legislative purpose furthered by rational means." Furthermore, because retroactive legislation presents problems of unfairness more serious than those posed by prospective legislation, there must be a persuasive reason for the potentially harsh impacts of retroactivity commensurate with the degree of the retroactive effect.

In short, the High Court articulated a balancing test, pitting the public policy purpose of the retroactive application of the statute against the substantive rights and reliance interests of the impacted parties. In cases where retroactive application cannot be justified given the scope and extent of settled interests, retroactive application will be struck down.

In reviewing prior precedent, the Court in *Matter of Regina* found that there are two types of retroactive statutes that are constitutional under this test: those employing brief, defined periods that function in an administrative manner to assist in effectuating the legislation, and those where the retroactive application is integral to the fundamental aim of the legislation.

In the case before it, the Court of Appeals found the retroactive period in part F was not rationally related to a legitimate governmental purpose. The retroactive period was neither brief nor defined, but rather bounded only by the length of the subject apartment's rental history. Similarly, the High Court found that extending the statute of limitations for overpayment claims retroactively upended landlords' reasonable expectations of repose relating to conduct that may have occurred years prior to the recovery period. Likewise, by extending treble damages retroactively, landlords faced increased penalties for past conduct and/or new penalties for damages that were not previously trebled. The Court further noted that these concerns are heightened when, as here, retroactive legislation "affect[s] contractual or property rights, matters in which predictability and stability are of prime importance."

Finally, the High Court evaluated specifically whether retroactive application of part F was rationally related to the statute's stated legislative purpose - increasing access to affordable housing. On this front, although the Court acknowledged that increasing a landlord's liability for overpayments prospectively could potentially increase access to affordable housing, increasing such liability retroactively does not. Rather, to apply part F retroactively to punish landlords for past conduct, the High Court determined the statute impaired a landlord's real property rights by diminishing or possibly eliminating their constitutionally protected return on investment.

In weighing these factors, the High Court ultimately determined retroactive application of part F was not rationally related to a legitimate legislative purpose and thus violated landlords' due process rights under both the State and Federal Constitutions. The Court noted that there was "no indication that the legislature considered the harsh and destabilizing effect on [landlords'] settled expectations, much less had a rational justification for that result."

Here, the retroactive application of FAPA suffers from the very same due process concerns. As in *Regina*, FAPA's retroactive period is neither brief nor defined, and only bounded in practice by the length of the mortgage - typically 30 years. Similarly, the retroactive application of FAPA expressly applies to cases in which final judgments of foreclosure and sale have been entered but a sale has not yet occurred, thereby upending the finality of judgments and impairing or eliminating mortgagees' vested property rights.

Given the serious impact on mortgagees' property rights, including their reasonable reliance on the law in effect at the time in advancing monies for property taxes, insurance, property upkeep, and repairs—to name but a few—it is noteworthy that the Legislature does not appear to have articulated a rational justification for upsetting these rights.

As in *Regina*, retroactive application of FAPA may very well be determined to be not rationally related to a legitimate governmental purpose and not survive a constitutional challenge.