

Foreclosure Abuse Prevention Act – Due Process Considerations Continued

By Morgan R. McCord

On February 2, 2023, we issued [a client alert](#) positing that the Foreclosure Abuse Prevention Act (“FAPA”) could very well be found to be unconstitutional if applied retroactively because of its potential to impair mortgagee’s vested rights. Since issuing our alert, several trial courts have weighed in on the issue. Based on our latest census, there appears to be a roughly even split between courts that have applied FAPA retroactively and those that have not. The overarching finding in cases that have applied FAPA retroactively is that, notwithstanding the impact on mortgagees, the legislature, and in turn the law, is entitled to a strong presumption of constitutionality¹. Most of the cases determining that the statute should not be applied retroactively find that because the statute does not expressly state that it is to apply retroactively, and retroactive application would impact mortgagees’ vested rights, there is a presumption that the statute applies prospectively only². Our firm recently successfully litigated a motion on this issue. This decision is a significant win for our client and mortgagees in general. As one of the first opinions finding retroactive application of FAPA to be unwarranted, we are hopeful it will pave the way for many decisions to come.

In [Wilmington Savings Fund v. Hack](#), the Supreme Court, Queens County granted our motion for summary judgment on the plaintiff’s behalf in January 2023. The defendant took an appeal from the decision and filed a motion seeking renewal, and vacatur of the order, based on the enactment of FAPA. The defendant argued that the complaint was time-barred under FAPA because the plaintiff could no longer utilize the six-month savings statute, as amended, because a prior action was filed by a different named plaintiff. In opposition, we argued, in line with the arguments discussed in our [February 2, 2023 client alert](#), that applying FAPA’s statutory amendments retroactively to deprive a mortgagee of its vested rights violated due process.

The court (Hon. Karina E. Alomar, J.S.C.) agreed with our argument, reasoning that because “FAPA does not explicitly provide that the newly enacted CPLR § 205-a shall operate, by relation back, to invalidate conduct prior to the enactment of FAPA ... it cannot be readily determined that FAPA was intended to take away or impair rights vested under existing laws prior to its enactment.” Consequently, the court denied defendant’s motion.

¹ See, e.g., *Deutsche Bank Nat’l Trust Co. v. Dagrín*, 2023 N.Y. Misc. LEXIS 1650 (Sup. Ct. Queens County Apr. 12, 2023) (J. Catapano-Fox).

² See, e.g., *Newrez LLC v. Kalina*, 2023 N.Y. Misc. LEXIS 1342 (Sup. Ct. Albany County Mar. 22, 2023) (J. Lynch); *MTGLQ Invs., L.P. v. Gross*, 2023 N.Y. Misc. Lexis 1280 (Sup. Ct. Westchester County Mar. 16, 2023) (J. Greenwald).

The Hack decision is not only a significant win for our client, but for mortgagees in general. As one of the first opinions finding retroactive application of FAPA to be unwarranted, we are hopeful it will pave the way for many decisions to come.