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Juxtaposition In Foreclosure Defense Litigation: Legislative Intent vs. Practical Reality

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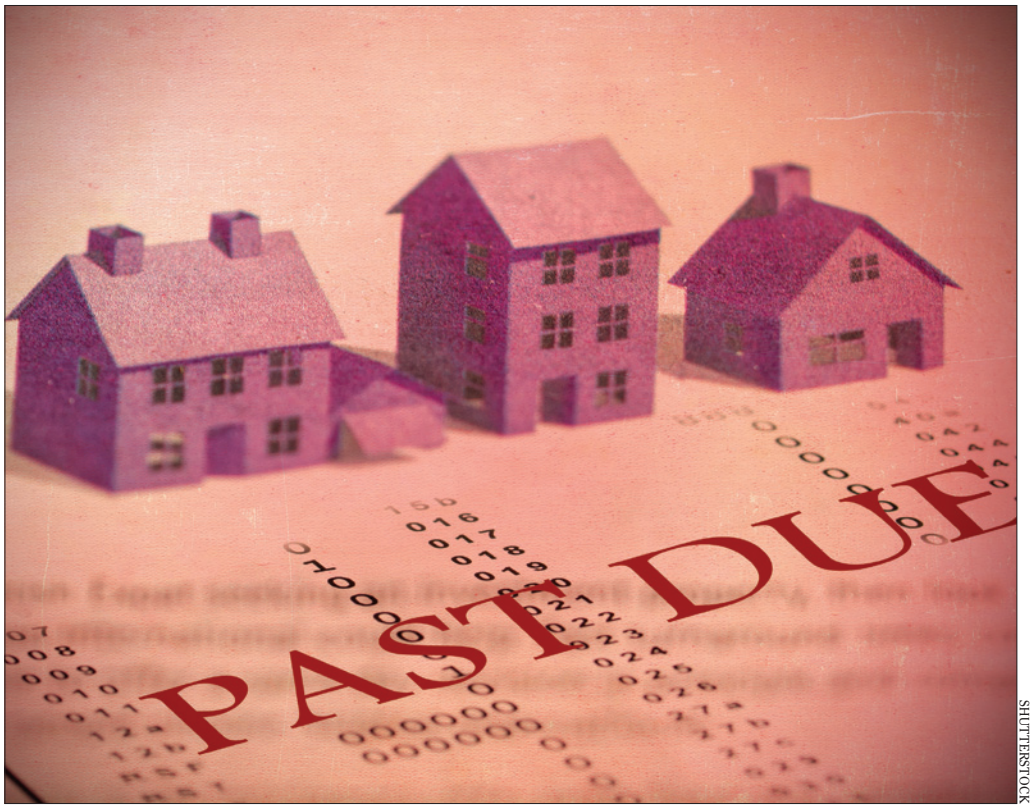

SHUTTERSTOCK

Foreclosure defense as a niche practice area has been an evolving response necessitated by the fallout from the mortgage crisis. Stated simply, the housing bubble of the early 2000s deflated when it was revealed that the mass securitization of mortgages was severely undercollateralized. Amid the resulting chaos, the banking industry collapsed and the impact was felt globally. The federal government enacted emergency legislation to allow bank bailouts and The Dodd-Frank Wall Street Reform and Consumer Protection Act changed the entire landscape of the mortgage lending industry as we knew it.

Federal legislation did not, however, offer much assistance locally or to individual homeowners who faced plummeting home values and staggering payments on high cost and subprime predatory loans that had been given out like Halloween candy during the boom. Homeowners cashed out all equity in their homes that were appraised at unrealistic and overly inflated values. Homeowners who in all rational markets would never have been approved for mortgages with low income and bad credit only had to demonstrate they had a pulse to get approved. New York was one of the hardest hit with an overwhelming number of foreclosures and homeowners in severe financial hardship. As of 2017, foreclosures in New York are still at alarming numbers and continue to rise: 72,000 pending foreclosure actions with over 112,000 homes in preforeclosure status.

New York state lawmakers recognized early on that there was an emergent need to help these distressed homeowners. With the fallout from the disgraced foreclosure

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law firm of Steven J. Baum and the exposure of the robo signing racket in 2009, Senator Klein and Assemblywoman Weinstein enacted comprehensive New York foreclosure legislation.

Initially, under this legislation all parties were required to engage in mandatory conferences where it was contemplated that workouts could be negotiated so homeowners could avoid foreclosure. The legislation also placed strict notice requirements on banks as conditions precedent to filing suit. These notices are sent to homeowners in default on their mortgage payments advising them of local agencies that are available to help them avoid foreclosure. The statutes detail required content, service methods, font type and color of paper it should be printed on. Some of the statutes resulting from this legislative effort became codified as CPLR §3408, RPAPL §1303, RPAPL §1304 and RPL §265-a The Home Equity Theft Prevention Act (HETPA).

These laws share a common theme of slowing down foreclosures to give homeowners a chance to save their homes and to make it harder for a bank to foreclose. This legislation had the immediate effect of enforcing an automatic stay on every state court foreclosure action and the creation of a Mandatory Foreclosure Settlement Conference Part.

In practice, however, the early years saw a majority of homeowners default on their foreclosure actions and get repeatedly denied for loss mitigation relief. The number of Motions to Vacate Defaults in these foreclosure actions under CPLR §5015 filed all over the state is extremely large. Invariably most defendants are unable to articulate an excusable default or present legally sufficient meritorious defenses.

Since 2009, New York Lawmakers have enacted amendments and new laws in their continued efforts to help distressed homeowners. In 2016 mandatory foreclosure conferences were enhanced by a Consumer Bill of Rights which was geared to require banks' and servicers to send representatives to these conferences with authority to settle. This was intended to stop the banks practice of sending legal counsel to act essentially as messengers without any real authority to resolve an action at conferences prolonged foreclosure actions and made the entire process of foreclosure conferences a futile exercise in most cases. Gov. Andrew Cuomo and Attorney General Eric Schneiderman created the Community Restoration Fund allowing for the purchase of mortgages in default and funding principal reductions and modifications to enable homeowners to retain their homes with affordable payback options. Programs like New York state's Homeowner Protection Program and New York State Mortgage Assistance Program are further evidence that New York lawmakers have been actively focused on protecting homeowners in foreclosure.

In New York state, the Judiciary's approach to statutory interpretation is grounded in the constitutional principle that the judicial will must bend to the legislative command. Eric Lane, "How to Read a Statute in New York: A Response to Judge Kaye and Some More," Hofstra Law Review: Vol.28: Iss. I, Article 3. The judge's role is not to impose his or her own individual preferences in interpreting a particular statute. The court's purpose "is not to pass on the wisdom of the statute or any of its requirements but rather to implement the will of the legislature expressed in its enactment … It is through the subordination of the judiciary to the legislature that our laws are assured their democratic pedigree." Id.

Where the language of a statute is clear and unambiguous, there is no need for judges to delve into the intent of the legislature in its enactment. In the foreclosure defense arena, where the legislature has enacted a series of laws, enacted policies and government funded programs—all clearly focused on a common goal—there should be uniformity among the courts and judges and case law should overwhelmingly favor the homeowner.

Given the dynamics of the typical foreclosure defense case, individual homeowners can very rarely afford to retain qualified counsel and most often end up appearing pro se or represented by attorneys who do not provide adequate representation. These clients are unable to afford high billable rates and, if unsuccessful at the state court level, can rarely afford to pay for costly appeals. In

addition, in most cases they will have already lost their homes by the time the case finally gets on the appellate court dockets. However, some cases that have made it demonstrate the Higher Court's deference to the legislative intent behind these laws. *First National Bank v. Silver*, 73 A.D.3d 162 (2d Dept. 2010); *Aurora Loan Services v. Weisblum*, 85 A.D.3d 95 (2d Dept. 2011); *Beneficial Homeowner Service Corp. v. Tovar*, 150 A.D.3d 657.

However, most homeowners are limited to the state court level and in certain counties and before certain judges that is simply the "kiss of death." In these localities, there has been a disappointing trend of judges using their "discretion" as a tool to punish homeowners who have not been paying their mortgage. Before these judges, despite a showing of egregious violations by the lender, faulty service and a lack of evidence of the foreclosing bank's right to foreclose, a staggering number of decisions go in the bank's favor.

If the poor homeowner does have the rare luck to have not defaulted on answering the complaint and gets to participate in foreclosure settlement conferences and the lender negotiates in good faith and a settlement is reached—Hallelujah! However, lenders in these jurisdictions rarely approve loan modifications and workout requests in which event the case gets released from the foreclosure conference part goes back before the IAS Judge. At that point, very rarely would any defense, no matter the evidence, come to the aid of the homeowner. Despite vehement allegations by homeowners of improper service, motions to vacate default are routinely denied and banks are awarded judgment.

These jurisdictions are overburdened with foreclosure cases and these cases are consolidated so they are decided by one or a handful judges in that court. Fellow practitioners in this area can surely relate and immediately identify the counties and judges who consistently rule in this manner.

Novel approaches must be adopted in these localities and cases litigated as long as possible, if only to give lawmakers the opportunity to somehow remedy this situation. Such an approach might include an amendment or special carve out to §5015 for foreclosure cases or perhaps a requirement that these counties have a larger pool of judges decide foreclosure cases instead of a select few. These localities are not hard to identify as the rulings coming down almost daily are against the homeowners. These are mere suggestions from a practitioner in the field.

It is heartening to note, however, that these jurisdictions and judges are in the minority. Many other jurisdictions and judges rule for the homeowner every day and the laws and facts are applied in conformity with legislative intent. There are many successes and wins to be had on behalf of the beleaguered homeowner in foreclosure.

If a practitioner does find himself or herself in one these counties, protection under Chapter 13 or 11 may be an alternative approach to remove a client quietly from the unfavorable state court. And if the practitioner can manage to do so before the entry of the judgment, the practitioner is not barred by the Rooker-Feldman doctrine from challenging the bank with all available foreclosure defenses in bankruptcy court.

Foreclosure defense is constantly evolving and is in this writers' opinion as a litigator an extremely exciting and challenging area of law. The divergence between counties in cases with similar fact patterns can be frustrating but is a further indication that lawmakers have more work to do so that rulings can be more consistent and uniform in the future.

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