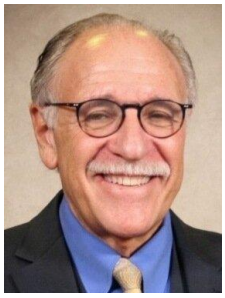
Why NY Foreclosure Abuse Prevention Act Should Pass

By Jeffrey Cohen and Christopher Gorman (April 29, 2022)



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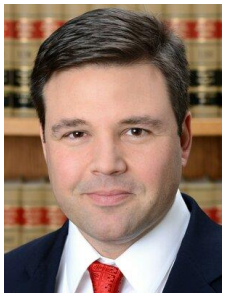

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The Foreclosure Abuse Prevention Act has passed the New York State Assembly and is under consideration by the New York State Senate. New York S.B. 5473D principally seeks to overturn the New York Court of Appeals' decision in Freedom Mortgage Corp. v. Engel.

Specifically, in contrast to Engel, FAPA proposes that the mere voluntary discontinuance of an existing foreclosure action does not serve to restart the running of the mortgage foreclosure statute of limitations.

In Engel, the Court of Appeals afforded mortgage lenders a right that no other litigant in New York has: the ability to unilaterally reset the statute of limitations, by discontinuing an action or by other unilateral means, and commence a successive action that would otherwise be time-barred.

The act provides to the contrary — it states that, once a foreclosure claim has accrued, a discontinuance of a foreclosure action or other revocation of the lender's acceleration of the debt shall not affect the statute of limitations.

FAPA seeks to reset things as they were in the mortgage foreclosure context before Engel. Namely, FAPA makes clear that the Civil Practice Law and Rules, the General Obligations Law, the common law of contracts and the public policy of New York state do not permit a party to unilaterally reset the statute of limitations on an already-accrued claim.

In Engel, the Court of Appeals held that a mere stipulation or order of discontinuance of a foreclosure action — even a stipulation or order that is silent as to the statute of limitations — automatically resets the statute of limitations on an action to foreclose a mortgage.

The Court of Appeals founded this right upon the mortgage contract right for the lender to accelerate the debt and, by implication, to revoke that election, i.e., deaccelerate.

But even if the mortgage contract conferred a right upon the lender to deaccelerate a debt, a holding that such deacceleration resets, extends or waives the statute of limitations or delays the date from which the statute of limitations for a claim to foreclose the mortgage is computed, is contrary to the law of contracts, the statute of limitations and the public policy of New York.

It has long been the law that parties to a contract may not agree, before the accrual of any liability, to extend or waive the statute of limitations or to postpone the time from which the period of limitations is to be computed.[1] The finding by the Court of Appeals in Engel of a right in the mortgage contract for a lender to unilaterally extend or postpone the period from which the statute of limitations is to be computed before a claim accrues falls squarely within the prohibition articulated in prior Court of Appeals authority.

Once a lender accelerates a debt, the six-year statute of limitations governing mortgage foreclosure actions begins to run on an action to foreclose the entire debt, and not simply the missed installment payments.

By interpreting a stipulation or order of discontinuance or other unilateral means to reset the statute of limitations on a claim for which the statute has already begun to run, the Court of Appeals effectively extended the statute of limitations on a claim for the entire debt and postponed the date from which the statute shall be computed.

This violates Civil Practice Law and Rule 201, which states that "[a]n action ... must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. ... No court shall extend the time limited by law for the commencement of an action."

It also violates Civil Practice Law and Rule 203(a), which states that "[t]he time within which an action must be commenced ... shall be computed from the time the cause of action accrued to the time the claim is interposed."

Such a unilateral right of a lender to reset the statute of limitations cannot be reconciled with the public policy of the statute of limitations. Indeed, the statute of limitations is not only a defense but also "expresses a societal interest or public policy of giving repose to human affairs," according to the New York Court of Appeals' 1979 decision in Kassner & Co. v. City of New York.[2]

A rule that allows one party to evade the statute of limitations and gives rise to a revolving door of successive actions hardly serves the objectives of finality and repose. In fact, such a rule eviscerates the statute of limitations and the public policy considerations underlying the Legislature's decisions to impose statutes of limitations for various claims.

In short, the Court of Appeals' decision in Engel was a substantial departure from New York contract and statute of limitations jurisprudence and is contrary to the public policy of New York.

Indeed, in deciding Engel, the Court of Appeals reversed all three of the Appellate Divisions that had ruled on the issue — which had previously and uniformly held, consistent with prior precedent, that a mere discontinuance of a foreclosure action did not reset the statute of limitations in the mortgage foreclosure context.

Indeed, the Court of Appeals itself held in Ost v. Mindlin in 1918 that the discontinuance of a foreclosure action is "not a consent to an extension of the time for the payment of the debt."[3]

Despite the efforts of some to mischaracterize the act, FAPA does not prohibit a lender from revoking its election to accelerate a debt, to the extent the mortgage contract permits revocation. Rather, the legislation prohibits the resetting of the statute of limitations by a lender's unilateral act of discontinuing an action or so-called deacceleration letter.

Prior to Engel, the vast majority of courts that considered this question head on held that a lender in a foreclosure action has no such right to unilaterally manipulate the statute of limitations. This is the same rule that applies to every other litigant in every other context.

The Court of Appeals offered no reason in Engel why mortgage foreclosure actions — or, more specifically, plaintiffs in mortgage foreclosure actions — should be singled out as having a different rule on the statute of limitations and the purported ability to reset the statute of limitations, when compared to every other type of claim, cause of action or type of plaintiff.

By attempting to tar the bill as allegedly prohibiting a lender's revocation of its acceleration of a debt, those who are mischaracterizing the act are confusing the issues, perhaps purposefully.

Even if the act is passed, there remain several well-established means of a borrower and lender to extend the statute of limitations. For instance, a modification agreement entered into between the lender and borrower can avoid the bar of the statute of limitations.

Indeed, the public policy and common law of contracts of New York have long recognized contracting parties' ability to contract, after a claim has accrued, to extend, postpone or otherwise modify the statute of limitations. This right is codified by statute, including General Obligations Law Section 17-105, which permits lenders and borrowers to expressly agree to waive, postpone or extend the mortgage foreclosure statute of limitations after a claim has accrued.

This right also promotes efforts between lenders and borrowers to reach resolutions, rather than litigate over statute of limitations issues, with resolution being something the Legislature has previously emphasized in other contexts when addressing issues in the mortgage foreclosure litigation arena.

Indeed, as the Legislature recognized, there was no need for the Court of Appeals in Engel to rewrite stipulations of discontinuance to correct an oversight by sophisticated lending institutions who failed to draft their stipulations in compliance with General Obligations Law Section 17-105 simply because these plaintiffs inexplicably failed to commence a new lawsuit within the remaining six-year statute of limitations period.

What the critics of the legislation appear to be lamenting is a lender's loss of its right, created only by Engel, to unilaterally manipulate the statute of limitations. But absent from the banking industry's jeremiads against the act is any discussion why a so-called right of a lender to unilaterally reset the statute of limitations is good public policy.

It is unclear how a unilateral act of a lender that deprives a borrower of a valuable statute of limitations defense could be deemed fair to borrowers. Lenders certainly have no quarrel in asserting the statute of limitations as a defense — as is their right — to avoid liability, as they have done frequently when responding to lawsuits, particularly ones arising in the wake of the 2008 financial crisis.[4]

No other plaintiff in New York gets the benefit of a new statute of limitations by simply discontinuing a lawsuit. Thus, the act merely makes mortgage lenders subject to the same rule that has long applied to all other litigants: namely, a successive lawsuit must be commenced within the remaining limitations period.

Consistent with its constitutional mandate, the Legislature acted swiftly in the wake of Engel to propose the act, which passed the Assembly by an overwhelming majority last month. Its passage in the Senate should be championed by all those who favor the even-handed and consistent application of the law.

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[1] John J. Kassner & Co. v City of New York, 46 N.Y.2d 544, 551 (1979).

[2] Id.

[3] Ost v Mindlin, 170 A.D. 558, 560 (1st Dept 1915),affd 224 N.Y. 668 (1918).

[4] Deutsche Bank National Trust Co. v. Flagstar Capital Markets, 32 N.Y.3d 139 (2018).