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# New York's FAPA at One Year – Explanation for Workout Officers

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Just over a year ago, on December 30, 2022, New York's Foreclosure Abuse Prevention Act ("**FAPA**") became law. In a Legal Alert dated January 30, 2023, we described the new and often confusing law and explained how it presented significant issues for lenders dealing with troubled loans secured by residential and commercial mortgages.[1]

Since that time there have been no less than fifty court decisions addressing FAPA issues, often with inconsistent rulings.[2] As lender attorneys, during the last year we have advised clients on the FAPA issues that have arisen in their workouts and have refined and updated our advice based on the developing case law and our experience addressing real life FAPA issues. Our advice continues to be on the conservative side given the law's many ambiguities and serious consequences. Until the issues are resolved, we will continue to counsel our clients on ways to avoid lethal traps and, whenever possible, utilize workarounds to accomplish what would, prior to the new law, have been simple workout solutions for the benefit of both borrower and lender.

This alert is meant to familiarize you with these traps. It is not meant to be a comprehensive or detailed explanation of FAPA, but rather to simplify certain aspects of FAPA and related workout concerns. We explore how some normal workout strategies might now be problematic considering FAPA and how lenders might nevertheless accomplish these workout strategies.

As explained in greater detail below, the major problems from FAPA relate to the statute of limitations for enforcing mortgage loans. There are two overarching issues.

First, lenders must be mindful of FAPA when they dismiss a foreclosure, agree to de-accelerate an accelerated loan, or extend an already matured loan. In many of these situations, lenders should, at minimum, enter into an agreement with their borrowers expressly extending the statute of limitations. Still, even with such an agreement, generally lenders should also limit the term of any extension to less than six years. Second, FAPA severely limits the existing six-month grace period for re-commencing a dismissed foreclosure action.

While FAPA creates problems for both lenders and borrowers alike, there are steps lenders can take to address some of the bigger problems, as discussed below.[3]

## I. Issues with Extending a Loan after Maturity or Acceleration

The first and possibly most significant FAPA issue arises when working out troubled mortgage loans after the statute of limitations starts running. New York's statute of limitations requires a mortgage holder to commence foreclosure within six years from the date a loan matures or is accelerated (a loan is generally accelerated by notice or by commencement of a foreclosure action). FAPA makes it more difficult for lenders and borrowers to work out such loans and put them back in the performing category with a de-acceleration and/or extension of the loan.

The major problem created by FAPA is due to its provision that the six-year statute of limitations no longer stops running when (a) a foreclosure action is discontinued, (b) a lender sends notice revoking acceleration, or (c) loan maturity is extended post-maturity.[4] Even if the parties expressly agree to discontinue the foreclosure action, revoke the acceleration (from a notice of acceleration and/or commencement of foreclosure), and extend the loan's maturity, due to FAPA, the statute of limitations may nevertheless continue to run. If the lender permits the six-year statute of limitations to continue running, the loan will become unenforceable after six years from the original acceleration!

Accordingly, it is important that lenders are aware of the problem and take appropriate steps to keep their mortgage loans from becoming unenforceable. Below are some considerations, assuming borrowers and their attorneys are engaged, cooperative and seek to avoid otherwise costly loan enforcement proceedings.

## A. Limiting Extensions After De-Acceleration or Maturity to Less Than Six Years

At minimum, if a lender agrees to work out a troubled mortgage loan after the statute of limitations begins to run, the parties should agree to (a) reset and extend the limitations period for six years from the date of such agreement and (b) limit any extension of the loan's maturity to less than six years and, as a practical matter, sufficiently less to permit the lender to commence an action to enforce the loan before the six-year limitations period expires.[5]

In doing so, lenders may want to consider using language such as the following in an extension agreement:

Notwithstanding that the Note [option for post maturity: matured by its terms prior to the date this Amendment was executed (which Amendment extends the Maturity Date of the Note)] [option for acceleration by notice or foreclosure: was accelerated prior to the date this Amendment was executed (which Amendment de-accelerates the Loan and modifies the Maturity Date of the Note)], Borrower acknowledges and agrees that the time for the Bank to bring a foreclosure action shall run from the date of this Amendment or any later date if permitted by applicable law, and further acknowledges and agrees that any payments made under the Note, as amended hereby, will have the effect of restarting the statute of limitations from the date each such payment is made.[6]

## B. New Loan (*i.e.,* Self-Refi) Approach

If the lender and borrower want to extend the reinstated loan beyond the six-year limitations period, the lender may want to consider a refinance of the old loan such that the lender and borrower end up with a new loan. As such, many of the following actions may be warranted: the lender should take the usual steps of internally approving the loan as if it were a new loan (i.e., loan application, underwriting, credit review, etc.) and the lender's counsel should document the loan with documents typically used for a new loan, including obtaining a

new title insurance policy and amending and restating the note and mortgage to document the new loan. Upon closing, the lender should complete a payoff of the old loan with an actual loan funding, with the funds constituting the new loan advance transferred to satisfy the old loan.

While this approach should permit the parties to normalize the lending relationship in all respects, including without any statute of limitations running until there is a new acceleration or maturity, it can be expensive, cumbersome and time-consuming.

## C. Short Term Extensions with Conditional Options to Further Extend

Another approach to consider is to, in effect, accomplish a long-term extension by a series of short-term extensions giving the borrower options to extend, but only if they agree to also extend the statute of limitations.

In other words, consider extending the loan for approximately five years with the borrower being given an option (or multiple options) to renew, which option(s) could be exercised upon executing and delivering a new agreement renewing the limitations period (which exercise should, of course, be predicated on there being no default at the time).

If a lender follows this approach, it must be careful to make sure that the option does not become effective, and the agreement to renew the limitations period is not signed and delivered, until shortly after each maturity date. The lender should require that the option be exercised within say ten business days after each maturity date, and to exercise the option, it must be accompanied by an agreement extending the statute of limitations another six years and be executed and delivered after maturity and within the prescribed deadline of the ten business days (unless, of course, the lender agrees to extend the ten days in writing).

## D. Payments Serving to Extend the Limitations Period

As an alternative to the above methods of dealing with FAPA, lenders might be able to rely on a provision of New York law which, for the most part, appears unaffected by FAPA and extends the statute of limitations period for six years after each installment payment is made, so long as the payment is not "accompanied by written disclaimer of intention to affect the time limited for foreclosure of the mortgage." (New York General Obligations Law § 17-107.)

Since FAPA's inception on December 30, 2022, a lender can fall victim to FAPA's landmines in several ways, the most common being (a) an agreement to extend longer than six years following proper de-acceleration, (b) an agreement to extend a loan longer than six years after its stated maturity date if entered into after the original maturity date (which starts the running of the statute of limitations) and (c) any agreement to extend, even for five years (for example), without obtaining an agreement from the borrower in such extension agreement to extend the limitations period.

However, under the General Obligations Law section noted above, all may not be lost if the borrower continues to make payments without any disclaimer of the payment's effect on the statute of limitations. Under this provision, the six-year statute of limitations should begin to run again after each such payment. Still, given that courts are likely to engage in a fact-specific inquiry to determine whether payments are of the type that should

result in an extension of the statute of limitations, depending on the circumstances the safer approach might be to utilize strategies A through C, discussed above.

We also caution that because borrowers could make such payments with a reservation of rights as to the statute of limitations, a lender should not rely on this statutory provision to save the mortgage from unenforceability. Further, we recommend that extension agreements, if any, include a provision that the borrower will be in default if it makes a payment with any such reservation of rights and lenders put in place procedures to monitor receipt of any such written disclaimers and flag loan accounts appropriately.

## II. Changes to the Six-Month Grace Period for Recommencing a Foreclosure After the Six-Year Limitations Period has Run

FAPA limits the circumstances in which lenders can utilize a statutory six-month grace period for recommencing a previously terminated foreclosure action in situations where the termination occurred after the six-year period had run. Before FAPA, if a lender started a foreclosure action and that foreclosure action was terminated more than six years after the statute of limitations started to run, in certain circumstances the lender was given six months after that termination within which to re-file a foreclosure.

FAPA further limits the circumstances in which this grace period applies and in fact eliminates it in the following situations: (a) the prior action was voluntarily discontinued or is dismissed involuntarily due to a number of grounds that, for the most part, would not have precluded use of the grace period pre-FAPA;[7] (b) the lender is an assignee of the original lender, unless it asserts and proves in the new action that it is acting on behalf of the original lender; (c) the lender fails to "complete" service of process in the new action within the six-month grace period;[8] or (d) the lender previously used the grace period (*i.e.,* it can now be used only once).

As noted, prior to FAPA, the grace period could be used by the original lender or any assignee, and it could be used if the action was voluntarily discontinued or in many cases of involuntary dismissal, and possibly could be used more than once.[9]

In sum, the lessons from the new limitations on the grace period are as follows: (a) if a foreclosure action is subject to dismissal, make sure any dismissal occurs well within the six-year limitations period and make sure the action is properly refiled and served before such original six years pass, (b) know that if the lender has previously used the grace period in connection with the mortgage it will no longer be available, and (c) if a lender is contemplating buying a loan, take the inability to use the grace period in the future into account when enforcing the mortgage and even in structuring the loan purchase transaction.

This last point is especially noteworthy for those lenders selling loans that were or are in foreclosure, as they should be prepared to address issues in connection with the six-month grace period with prospective loan purchasers. [10]

## III. Conclusion

In sum, while more and more courts are confronted with litigation concerning how to interpret FAPA (including the potential harsh results from the retroactive application of FAPA and the constitutionality of FAPA's retroactive application which can also advise you about), one fact remains. At least for the foreseeable future, many, if not all, aspects of FAPA are here to stay. Our goal is to provide lenders with practical strategies on how best to navigate FAPA's unchartered waters so as to mitigate its risks and negative consequences. FAPA potentially plays a role in all aspects of New York mortgage loan workouts, whether it be a restructuring, loan purchase and sale, or foreclosure-related litigation. To that end, our Loan Workout Practice group will continue to provide strategic targeted advice for your portfolio of loans on all fronts and keep you apprised of further noteworthy developments on FAPA.

*Please note this is a general overview of developments in the law and does not constitute legal advice, which should only be given with a full understanding of the relevant facts. Nothing herein creates an attorney-client relationship between the sender and recipient if one did not previously exist. If you have questions regarding the Foreclosure Abuse Prevention Act and its impact, please reach out to your attorney contact at the firm or call us at (516) 357-3700. For general information on loan workouts, see the firm's Loan Workout Practice webpage at https://www.cullenllp.com/practices/loan-workout/*

## Footnotes

[1] https://www.cullenllp.com/blog/new-york-foreclosure-abuse-prevention-act/

[2] Such inconsistencies include rulings about whether FAPA is to be applied retroactively and whether such retroactive application is constitutional.

[3] While the considerations below are untested in the courts given FAPA's relative infancy, we believe they provide practical value when dealing with loans that have previously been accelerated or have matured.

[4] Under pre-FAPA law, so long as the six-year period had not fully run since the loan was accelerated, a lender could voluntarily discontinue a foreclosure action or send a notice revoking an acceleration and doing so would stop the six-year statute of limitations from running until any new acceleration. Similarly, a lender and borrower could agree to extend a matured loan after maturity for as long as they liked, and it was understood and generally accepted that the statute of limitations would start to run again upon a new acceleration or the new maturity.

[5] The lender should institutionally record not only the maturity, but the fact that at maturity, the lender must quickly move forward with litigation or enter into a new modification and extension agreement (again for less than six additional years) before the statute of limitations expires.

[6] As discussed below in Section "C", payments should extend the limitations period provided they are not accompanied by a disclaimer of those payments serving to extend the limitations period. In conjunction with this language, lenders may want to consider making it a default to make any payment with such a disclaimer.

[7] These reasons included lack of personal jurisdiction or a host of grounds relating to delay and/or neglect on the lender's part. CPLR 205-a lists nine non-exclusive forms of neglect that would preclude use of the grace period whether or not found by the original trial court as the basis or bases for the dismissal, meaning the judge

assigned to the new foreclosure action could find that those reasons existed in the prior action.

[8] Pre-FAPA, all that was required was for service to be "effected," such as by delivering the summons and foreclosure complaint to the defendant; "completion" on the other hand requires the plaintiff in some circumstances to file proof of service, along with the passage of ten days after such filing. Thus, under FAPA, the six-month period is potentially shorter by at least ten days plus the time it takes to file proof of service.

[9] Some courts had held pre-FAPA that the prior version of the savings clause could only be used once. *E.g., Ray v. Ray*, 22 F.4th 69, 73 (2d Cir. 2021).

[10] Issues with structuring a loan sale/purchase transaction to address potential loss of the grace period are beyond the scope of this alert, but we can advise you on this issue in connection with such transactions.

## Practices

- Loan Workout