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FAPA AND THE GROUNDBREAKING IMPACT ON THE MORTGAGE INDUSTRY

Eighteen months after the enactment of the Foreclosure Abuse Prevention Act (“FAPA”), litigants still face uncertainty and unresolved constitutionality issues, and await more definitive rulings from the New York state and federal appellate courts.

By Andrew B. Messite and Michael V. Margarella *

Lenders in New York are battling uncertainty as to their ability to recover collateral on loans that are years in default following the passage of the Foreclosure Abuse Prevention Act (L 2022, ch 821, §§ 5, 6) (“FAPA”). Lenders have challenged FAPA in New York State courts and federal courts and await determinations as to constitutionality from the highest state and federal courts. Nearly 18 months after its passage, the future of FAPA is uncertain and remains subject to attacks on enforceability, particularly as to its retroactive use.

ACCELERATION OF A LOAN AND ACCRUAL OF THE STATUTE OF LIMITATIONS

In New York, a foreclosure action is subject to a six-year statute of limitations.¹ In most instances, lenders

¹ *U.S. Bank v. Papanikolaw*, 2021 NY Slip Op 04777 (2d Dept. 2021).

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“accelerate” the entire debt following a borrower default and the statute of limitations begins to run on the entire debt upon acceleration of the entire indebtedness, rather than the defaulted installment payments. When a loan is accelerated, it results in the accrual of the statute of limitations as to the entire indebtedness, not just the missed payment(s).

The most common way to accelerate a loan is to file a foreclosure complaint including language as to the acceleration of the debt.² A borrower’s default on the loan, in and of itself, does not cause an acceleration.³ Nor does a resulting default notice stating that a lender

² *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980 (2d Dept. 2012).

³ *Milone v. U.S. Bank, N.A.*, 164 A.D.3d 145 (2d Dept. 2018).

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