NYSBA FALL 2010 | VOL. 38 | NO. 4

# N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

## Inside



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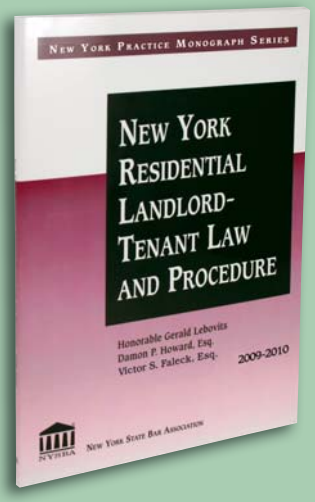


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2009-2010 / 366 pp., softbound
PN: 41699

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# Table of Contents

# Message from the Section Chair

The summer meeting this year was held at the historic Seaview Inn in Galloway, New Jersey, near Atlantic City and Smithville. The Inn has a golf course which has been a part of the PGA and LPGA tours. We ate our fill of lobster. We had outstanding CLE. Our first Vice Chair, Ed Baer, did a great job coordinating the CLE and the many social events. The weather was very hot and sunny. It was a real pleasure to see so many families in attendance. It was, by all accounts, a smashing success.

Shortly after our return, we learned of the death of longtime Committee Member, Gene Morris. When I first joined the Executive Committee there were four towering giants in the field on the Committee, Jim Pedowitz, Gene Morris, Bernie Rifkin, and Bernie Goldstein. With the passing of Gene Morris, we have only Jim Pedowitz. As a baby attorney it was so fascinating to watch them debate issues or summarily dismiss a question with a single case name—such as *Buffalo Academy*. Gene was a prolific writer. I had the pleasure of assisting him with updates on one of his Matthew Bender publications several years ago. He treated his works as if they were his children. They were very special to him. His son, Dick Morris, wrote a very touching tribute to Gene on his blog: http://www.dickmorris.com/blog/eugene-j-morris-1910-2010.

Thanks to the efforts of Ben Weinstock and his Task Force, the corrective legislation on powers of attorney passed through both houses of the Legislature and has been signed by the Governor. There may be more work to do but this was an excellent start.

The Legislation Committee produced another very successful lobby day. Both the Governor's office and Assembly Member Weinstein's office asked for our input on bills being considered. Through the efforts of Karl Holtzschue and his Committee, the RPLS is now seen as a resource to government on difficult real property issue. Mel Mitzner is working with the Governor's office on electronic recording issues.

**All the best for a healthy and prosperous fall,**

**Anne**

As this edition of the *Journal* was going to the printer, we learned of the untimely death of our dear friend and first Vice Chair, Edward Baer, on September 20, 2010. Ed is survived by his best friend and wife, Donna Baer, his daughter Lindsay, and son, Ben, as well as his parents, Ralph and Terry Baer, and his sister, Randye. Our Winter edition of the *Journal* will contain a memorial to Ed.

# The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect

Hon. Mark C. Dillon

## Introduction

There was only one mortgage foreclosure action filed in Putnam County, New York, in 2005.[1] Three years later, in 2008, there were fifty-three mortgage foreclosure actions filed in the same county,[2] representing a 5,200% increase in foreclosures in three years. In Orange County, New York, eight mortgage foreclosure actions were filed in 2005.[3] In 2008, the number of new mortgage foreclosure actions rose to an even 1,200,[4] representing a 14,200% increase in such filings. In Westchester County during the same time frame, the number of foreclosures rose from 565 to 1,676,[5] which is not as stunning as the increases that occurred in Putnam and Orange Counties, but still more than a threefold increase. The crisis in subprime lending that developed in 2007, 2008, and 2009 prompted a significant increase in foreclosures in many counties in the State of New York. Nationally, 860,000 homes were sold in foreclosure in 2008.[6] In the third quarter of 2009 alone, foreclosures reached a record national high of 937,840 homes that received a default notice, an auction notice, or that were repossessed by a bank.[7]

The New York State Legislature endeavored to cope with the dramatic increase in mortgage foreclosures by enacting a variety of statutes that are known, in omnibus form, as the Subprime Residential Loan and Foreclosure Laws.[8] The statutes included in the omnibus legislation are RPL 265-b, RPAPL 1302, 1303 and 1304, Banking Law 6-*l*, 6-m, 590-b and 595-599, GOL 5-301(3), and, as central to this Article, CPLR 3408.[9] CPLR 3408 is, therefore, a piece of a broader statutory mosaic.

This Article examines the newly-enacted CPLR 3408 as it pertains to foreclosure actions filed in the State of New York. As will be shown below, CPLR 3408 fulfills a worthwhile purpose of requiring early settlement conferences with the trial courts, in the hope of preserving family home ownership, particularly for minorities and the poor, who are, statistically, most affected by the crisis in subprime mortgages.[10] As will also be shown below, however, the language of the legislation presents minor procedural flaws that can be rectified by judges who are sensitive to the overriding purpose and intent of the statute. This Article is written with the hope and expectation that its subject matter is legally, economically, and socially timely.

## I. The Particulars of CPLR 3408 as Originally Enacted

An appropriate starting point is the language of CPLR 3408. The statute, which does not have a predecessor,[11] became effective on August 5, 2008.[12] Because the statute is relatively new, as of this writing, only a limited body of case law has been generated at the trial level. Few issues involving CPLR 3408 have had sufficient time to percolate to any of the state's four Appellate Divisions for statutory interpretation and application.

The original language of CPLR 3408 reads, in pertinent part,

> (a) In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the country clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

There are several words and phrases in CPLR 3408(a) that are noteworthy. These include the stated purpose of the statute, the types of mortgages and defendants within its scope, and its chronological and procedural requirements. Each is discussed below.

### A. The Stated Purpose and Intent of CPLR 3408

It is striking that within the original single paragraph of CPLR 3408(a), the terms "settlement," "resolution,"

and "agreed to" appear a total of five times. The terms underscore the purpose and legislative intent of the statute. CPLR 3408 was enacted to foster the early settlement of foreclosure actions as a means of preserving home ownership and to mitigate the subprime credit crisis, through the mandated auspices of the courts.[13] The law requires that a conference be conducted in foreclosure actions between the parties and the court, for the purpose of, *inter alia*, determining whether the parties can resolve the litigation and keep families in their homes by adjusting payment schedules or the amounts due.[14] Previously, there had been no such settlement conference requirement in New York. Professor David Siegel notes that since the state is unable to alter, *ex post facto*, the laws that were in effect when mortgage transactions were undertaken, a settlement conference between the parties under the auspices of the court may be the next best alternative to minimize the number of home foreclosures.[15]

Any adjustments that could be made in payment schedules or amounts due as a result of the conference benefit, in the first instance, the defendants being foreclosed upon. A 2009 report of the Brennan Center for Justice at New York University School of Law has identified the secondary benefits arising out of foreclosure settlements, beyond the obvious benefit of preserving families in their homes and communities.[16] These secondary benefits are to neighborhoods whose property values decline as a result of foreclosures,[17] municipalities that lose a portion of their local tax revenue,[18] higher crime rates that have been linked to foreclosure rates,[19] and lenders that often lose money from the foreclosures.[20]

### B. The Mortgages to Which CPLR 3408 Originally Applied

A second noteworthy aspect of CPLR 3408(a) is the statute's built-in definition of the types of mortgage foreclosure actions for which the mandatory settlement conferences originally applied. Three types of applicable mortgages were specified.[21] One was the "subprime" loan as defined by RPAPL 1304.[22] A second was the "nontraditional home loan" as defined by RPAPL 1304.[23] The third was the "high-cost home loan" as defined by Banking Law 6-*l*.[24] The statutory language suggests that care was taken in isolating the mortgages that are within the scope of the statute. These three types of mortgages are more susceptible to default during times of declining housing values, as they represent the greatest expense to the riskiest of borrowers. The settlement conference mandated by the original version of CPLR 3408 did not apply to actions involving a mortgage other than one of the types specified in the statute.[25] Accordingly, "traditional" home loans were not within the defined scope of the statute.

The three mortgages identified in CPLR 3408 have different meanings. A "subprime" loan is defined as a home loan consummated between January 1, 2003 and September 1, 2008 secured by a mortgage or deed of trust on real estate upon which there is located, or is to be located, one or more structures intended to be used principally for occupation by one to four families, including the borrower, and for which the terms of the loan exceed a "threshold" defined in RPAPL 1304(5)(d).[26] For first lien mortgage loans, the threshold is exceeded when the annual percentage rate of the home loan, at the time of consummation, is three or more percentage points over the yield on treasury securities with comparable periods of maturity, measured as of the fifteenth day of the month in which the loan was consummated.[27] For subordinate mortgage liens, the threshold is five or more percentage points over the treasury security yields.[28] Subprime home loans do not include transactions to finance the initial construction of a dwelling, temporary or "bridge" loans with a term of twelve months or less, or home equity lines of credit.[29] If any home loan offers percentage terms that are lower during an initial or introductory period, with a higher rate after the end of such period, the threshold is determined by using the rate that becomes applicable after the initial or introductory period.[30]

A "nontraditional home loan" is defined as a payment option adjustable rate mortgage, or an interest only mortgage, consummated between January 1, 2003 and September 1, 2008.[31]

A "high-cost home loan" is defined in Banking Law 6-*l*. Its definition is more complicated than the definitions of subprime and nontraditional home loans. A high-cost home loan is a separately-defined "home loan"[32] that presents the additional component of being "high-cost." A "home loan" is defined in Banking Law 6-*l*(1)(e) as a debt incurred by a natural person for personal, family, or household purposes, secured by a mortgage or deed of trust upon New York State real estate that is used as a principal dwelling for one to four families.[33] A "home loan" must also reflect a principal amount that does not exceed the conforming size limit for a comparable dwelling, established periodically by the federal national mortgage association.[34] Home loans do not include "reverse mortgage" transactions.[35] A home loan becomes "high-cost" when the terms of the loan exceed a threshold defined by Banking Law 6-*l*(1)(g).[36] This threshold is met for first lien mortgage loans when the annual percentage rate of the home loan at the time of consummation exceeds "eight percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender."[37] For subordinate mortgage liens, the threshold is nine percentage points above the treasury security yields.[38] As with subprime loans, if any home loan offers percentage terms that are lower during an initial or introductory period, with a higher rate after the end of such period, the threshold

is determined by using the rate applicable after the initial or introductory period.[39] As an alternative to the threshold, a home loan will become "high-cost" if total points and fees exceed 5% of the total amount of the loan for loans of $50,000 or more; or 6% of the total loan amount of $50,000 or more and the loan is a purchase money loan guaranteed by either the Federal Housing Administration or the Veterans Administration; or the greater of 6% or $1,500, if the total loan amount is less than $50,000.[40]

The three types of mortgages underlying the 2008 version of CPLR 3408(a) had one additional significant element in common: namely, that they apply to residential mortgages only.[41] Commercial mortgages are noticeably absent from the language of CPLR 3408, RPAPL 1304, and Banking Law 6-*l*. The language of CPLR 3408 suggests that the legislature's intent of curbing mortgage foreclosures is directed only at residential home ownership, and does not extend to businesses.[42]

No cases have yet been reported where parties have conclusively litigated whether the mortgage at issue was within, or without, the scope of CPLR 3408. One case that came close was *Accredited Home Lenders, Inc. v. Hughes*, in which the plaintiff and the defendant differed on the question of how the mortgage between them should be classified for purposes of CPLR 3408.[43] The defendant argued that the mortgage was a nontraditional home mortgage, whereas the plaintiff contended that the mortgage could instead qualify as a subprime home loan.[44] The Supreme Court, Essex County, did not need to reach this issue, as both types of mortgages qualified under CPLR 3408, and as the dispositive issue between the parties was whether the defendant resided in the subject property as to trigger the settlement conference requirement of the statute.[45]

Another case that touched upon the issue of whether a residential mortgage fell within the scope of CPLR 3408 is *Butler Capital Corp. v. Cannistra*.[46] In *Butler Capital Corp*., the Supreme Court denied the plaintiff's motion for a judgment on default, as the plaintiff's moving papers failed to establish that the loan at issue was a subprime, nontraditional, or high-cost home loan within the mandates of CPLR 3408.[47]

It is predicted here that before long, courts will be asked to resolve disputes between parties in foreclosure actions on the question of whether a particular loan, subject to the 2008 version of CPLR 3408, falls within or without the scope of CPLR 3408 and its mandatory settlement conference requirement.

The statute's remedies have been held to be unavailable to defendants who are actually engaged in duplicitous mortgage schemes.[48]

### C. The Necessity of Defendants Residing at the Mortgaged Premises

A third noteworthy aspect of CPLR 3408 is its residency requirement. CPLR 3408 specifically applies to actions where "the defendant is a *resident* of the property subject to foreclosure."[49] On the face of the statute, a borrower who is not a resident of the property being foreclosed upon is not entitled to the settlement conference mandated by CPLR 3408. The issue of the borrower's residence was important in *Indymac Federal Bank FSB v. Black*.[50] In *Indymac*, the defendant entered into a subprime home loan, defaulted in her payment obligations, and was served with process in the plaintiff's foreclosure action in Florida.[51] The plaintiff argued that the defendant was not entitled to a settlement conference under CPLR 3408 as she had been located in Florida when process was served and was not, therefore, a current resident of the property being foreclosed upon.[52] The Supreme Court, Rensselaer County, disagreed, noting that the mere service of process in Florida was insufficient evidence, in and of itself, to demonstrate that the subject premises in New York was not the defendant's principal residence.[53] By implication, had the plaintiff presented the court with stronger evidence that the defendant's residence had in fact been relocated to Florida, the court may have reached a different conclusion as to whether the defendant qualified for a mandatory settlement conference.

One issue that was missed in *Indymac* is that under New York law, a party may simultaneously have more than one residence. A party may have only one "domicile," which is physical presence in one state location with the intention that the state be an actual and permanent home, but may have multiple "residences," which is a looser term dependant upon a person's significant connections with states.[54] CPLR 3408 does not refer to a defendant's domicile, or even to a defendant's "principal" residence, but instead requires that the defendant merely be "a resident of the property subject to foreclosure." Accordingly, in a case such as *Indymac*, the defendant could be a "resident" of the New York property subject to foreclosure even if that same defendant also owned a home in another state (such as Florida), and was found there for service of process.

According to one court, the language of CPLR 3408 does not expressly address whether a foreclosure defendant must reside at the property when the mortgage contract is executed, or, rather, when the foreclosure action is commenced.[55] This difference is potentially significant. In *Accredited Home Lenders, Inc. v. Hughes*, the defendants entered into a subprime home loan for property in Essex County, New York and defaulted on their payment obligations.[56] The defendants were residing in New Jersey, either permanently or temporarily, when the foreclosure action was later commenced.[57] The plaintiff argued that CPLR 3408 was inapplicable, as the defendants' residency in New Jersey meant that they were not residents of the New York property that was subject to foreclosure.[58] The Supreme Court disagreed, focusing

on the language of RPAPL 1304 that is incorporated into CPLR 3408, which defines subprime and nontraditional home loans.[59] The court noted that under RPAPL 1304, a default notice must be transmitted to the borrower by registered or certified mail and by regular mail at least ninety days prior to the commencement of any foreclosure action, and that such notice must be sent to the address of the mortgaged premises *or* to the borrower's last known address, if different.[60] The court, therefore, viewed RPAPL 1304 as acknowledging that borrowers of subprime and nontraditional home loans might not live at the mortgaged property at the time foreclosure actions are commenced, which is ambiguous when juxtaposed against the language of CPLR 3408 that requires, in present-tense language, that borrowers reside at the mortgaged property.[61] Finding the statute ambiguous, the court stated that the legislative intent of CPLR 3408 was to expansively benefit borrowers subject to subprime and nontraditional home loans, other than owners of second homes or investment properties.[62] The court held that CPLR 3408 was not intended to require borrowers to remain at their mortgaged premises while foreclosure actions were being prepared or were pending.[63] The court, therefore, concluded that even if the defendants had relocated their residence to New Jersey, they were entitled to the mandatory settlement conference conferred by CPLR 3408.[64]

The reasoning used by the court in *Accredited Home Lenders* is arguably incorrect. Courts must interpret the meaning of statutes by looking at the plain language used by the Legislature, as it is the clearest indicator of statutory intent.[65] Only when a statute is ambiguous will courts examine the legislative history underlying the statute for evidence of the Legislature's intent.[66] Here, the language of CPLR 3408(a) speaks purely in the present tense; the statute applies to a defendant who "*is* a resident of the property subject to foreclosure."[67] The terms "is" and "subject to foreclosure" necessarily pertain to the present tense, when a property is in default and when a foreclosure action is pending. Reference by the court in *Accredited Home Lenders* to the residence language of RPAPL 1304 is misplaced, as RPAPL 1304 is only incorporated by reference into CPLR 3408 for the limited purpose of defining the meaning of "subprime" and "nontraditional" home loans.[68] The language of CPLR 3408 that entitles the borrower to a settlement conference, where "the defendant *is a resident of the property subject to foreclosure*,"[69] is explicit and unambiguous. The present-tense language of the residency requirement of CPLR 3408(a) trumps any seemingly inconsistent language in RPAPL 1304, as only CPLR 3408 defines the circumstances under which the defendant is entitled to the statute's mandated settlement conference. Consequently, an argument can be made that, contrary to the conclusion reached in *Accredited Home Lenders*, the better construction of CPLR 3408 is to apply its residency requirement to defendants as of the time the action is commenced to foreclose upon the property, remove the borrower occupants, and pass title through a court-appointed referee.

In a significant portion of foreclosure actions, the plaintiffs eventually file summary judgment motions under CPLR 3212. CPLR 3408 contains no language prohibiting the filing and service of summary judgment motions prior to the required settlement conferences mandated by CPLR 3408. Presumably, if a summary judgment motion is filed before the parties have had an opportunity to conduct the settlement conference, the court will need to hold the motion in abeyance until the conference is completed, since granting any such motion earlier would defeat the purpose of the statute. Some plaintiffs might nevertheless file their summary judgment motions early in foreclosure litigations, as a means of increasing their leverage over defendants during the settlement discussions that will occur while the motions are pending. Other plaintiffs might delay summary judgment motions until conferences are held and determined to be unsuccessful, which is an approach more consistent with the purpose and intent of the statute.[70]

### D. Internal Chronological Limitations

A fourth noteworthy aspect of CPLR 3408(a) is its chronological limitations. CPLR 3408 originally became effective as of August 5, 2008.[71] It applies only to foreclosure actions commenced on or after that date,[72] as distinguished from actions already pending by that date.[73]

The 2008 version of the statute also provides that the mandatory settlement conference applies only to foreclosure actions involving "high-cost" mortgages executed between January 1, 2003 and September 1, 2008.[74] These dates presumably apply to the time period during which there were lax mortgage underwriting standards. A close reading of the original language of CPLR 3408(a) reveals that the time limitations are applied to foreclosure actions involving "high-cost home loan[s]," and that no corresponding time limitation is expressly applied to actions involving subprime mortgages or nontraditional home loans.[75] The time limitations for applicable mortgages are set-off in CPLR 3408(a) by commas in connection with high-cost home loans, but are not similarly set-off with respect to either subprime or nontraditional home loans.[76] This may merely be inartful draftsmanship, or the Legislature might have intended that no chronological limitation apply to subprime or nontraditional mortgages. As of this writing, no case has yet addressed the applicability of CPLR 3408 to subprime or nontraditional home mortgages executed outside of the time frame between January 1, 2003 and September 1, 2008.

### E. The Statute's Non-Retroactivity

Statutes in New York are generally presumed to have prospective application, unless their language expressly or impliedly requires a retroactive construction.[77] CPLR 3408

contains no language indicating that it may be applied to actions pending prior to its effective date.[78]

One case confirms the absence of retroactivity, *LaSalle Bank National Ass'n v. Novetti*.[79] *LaSalle Bank* involved a foreclosure action commenced on February 13, 2008, prior to the effective date of CPLR 3408.[80] The defendant initially defaulted in appearing and answering the plaintiff's complaint.[81] An order of reference was rendered on September 16, 2008, after the effective date of CPLR 3408, and was followed by a judgment of foreclosure and sale executed by the court on January 26, 2009.[82] Thereafter, on February 5, 2009, counsel for the defendant, who had belatedly appeared in the action, demanded a settlement conference and moved to stay the foreclosure sale pending the conduct of the conference.[83] The Supreme Court, Suffolk County, denied the defendant the settlement conference contemplated by CPLR 3408 on the ground that the foreclosure action had been commenced prior to the effective date of the statute.[84] The court's ruling appears to be correct. If CPLR 3408 is viewed as a remedial statute, intended to stem the rash of home foreclosures within the state by providing defendant homeowners with a new right to a settlement conference, then the statute—as with all statutes that create new rights—is to be applied prospectively.[85] If CPLR 3408 is instead viewed as merely procedural in nature, then it is to be applied in pending actions only as to procedural steps to be undertaken after the statute's enactment.[86] In *LaSalle Bank*, the 60-day settlement conference period had presumably already passed by the time CPLR 3408 became effective.

Separate from CPLR 3408, the state also enacted, at the same time, an Unconsolidated Law that provides certain retroactive relief to defendant homeowners. Section 3-a of the enacted bill[87] provides that, for residential foreclosure actions commenced before September 1, 2008, courts must ask the plaintiff whether the loan at issue falls within the scope of the new statute, and, if it does, the court must then notify the defendant of the right to demand a settlement conference.[88] Curiously, the language of Section 3-a expressly applies to subprime and high-cost home loans as defined by RPAPL 1304 and Banking Law 6-*l*, but does not expressly apply to nontraditional home loans, unlike CPLR 3408.[89] A settlement conference under Section 3-a is not a mandated right. Section 3-a further provides that, to be eligible for a settlement conference, the defendant must reside at the property subject to foreclosure and the action must not yet have proceeded to judgment.[90]

### F. Telephonic and Video-Conferencing

The last sentence of CPLR 3408 refers to a telephonic and video-conference option.[91] Participation in a foreclosure settlement conference by electronic means is a matter left to the discretion of the court.[92] Video-conferencing, whatever its merits given current technology, is not a concept that is otherwise recognized in either the CPLR or in the Uniform Rules for the New York State Trial Courts.[93] Notably, the option under CPLR 3408 is expressly limited to "a *representative of the plaintiff* to attend the settlement conference telephonically or by video-conference."[94] The electronic option is not extended, by the wording of the statute, to defendants or their attorneys.

The statute's provision that a "representative of the plaintiff" may be permitted to electronically participate in the conference does not appear to refer to the plaintiff's attorney. CPLR 3408 refers frequently to "the plaintiff," "the defendant," "parties," and "counsel." The term "representative of the plaintiff" appears only one time in the statute, when referring to the electronic participation option. The Legislature's use of the term "representative" rather than "counsel" suggests that the individual who may participate in the conference electronically is someone other than the plaintiff's attorney; otherwise, the Legislature could have simply referred to the individual as the plaintiff's counsel, as it did elsewhere. The Bill Jacket for CPLR 3408 sheds no particular light on the identity of this "representative." However, the term likely refers to a representative of the bank or mortgage company, such as a corporate officer, litigation manager, or accountant involved in settlement-related decision-making or the computation of proposed compromised payment schedules.

It remains to be seen how frequently the statute's electronic participation option will be used. On the one hand, loan specialists' participation in settlement conferences from remote locations may recognize a manpower reality: that the volume of mortgage foreclosure conferences necessitates this accommodation to party plaintiffs. On the other hand, courts might find that settlements are less likely to be achieved absent the face-to-face participation of all individuals necessary to the successful resolution of a foreclosure action.

## II. The Expansion of CPLR 3408 Effective December 15, 2009

The ink was dry on the original version of CPLR 3408 for less than a year before bills were introduced in the New York State Legislature to expand its scope. The bills that emerged from the State's Senate and Assembly, S66007 and A40007, mandated the conduct of settlement conferences in all residential mortgage foreclosure actions, not just those involving subprime, nontraditional, or high-cost mortgages.[95] The expanded legislation was signed into law by Governor David Paterson on December 15, 2009.[96]

The amendment of CPLR 3408 adds, *inter alia*, subdivisions (d) through (h) to the statute.[97] The amended statute keeps intact all aspects of the original version of the statute, except for the application of its terms in subdivision (a) to

all "home loans."[98] The meaning of "home loans" is set forth in RPAPL 1304, and includes all loans for one- to four-family dwellings secured by a mortgage or deed of trust. The amended statute therefore abolishes the need for qualifying residential mortgage foreclosure defendants to be parties to subprime, nontraditional or high-cost loans. Inferentially, the expanded statute recognizes a current economic reality that the foreclosure problem in New York extends beyond subprime, nontraditional and high-cost residential mortgages, to conventional residential mortgages as well.

Predictably, the 2009 amendments to CPLR 3408 will place an immediate added burden on the court system, which shall now be required to conduct a significantly increased number of foreclosure settlement conferences without any earmarked funding to meet the need.[99] The New York State Office of Court Administration estimates that the new statewide foreclosure filings for 2009 will approximate 46,000,[100] which suggests the magnitude of the challenge facing the conferencing courts in 2010 and beyond.

The expansion of CPLR 3408 to all residential home loans is subject to an intriguing "sunset" provision. It provides that the expansion of the statute to all "home loans" be effective for only five years from the effective date of the 2009 version of CPLR 3408(a), at which time the statute reverts to its original 2008 form that limits the mandatory foreclosure settlement conferences to subprime, nontraditional, and high-cost residential mortgages.[101] Inferentially, the presence of a sunset provision suggests legislative optimism that the current residential mortgage foreclosure difficulties will lessen with time.

CPLR 3408(f), as now enacted, requires that plaintiffs and defendants negotiate with each other in good faith during their mandated settlement conferences.[102] The statutory purpose of the settlement conferences will not be achieved absent the good faith of the parties involved. CPLR 3408(f) does not set forth any specific remedy for a party's failure to negotiate in good faith. However, in one reported decision dealing with this subject prior to the effective date of the amended statute, a court held that the failure of the plaintiff bank to negotiate in good faith during the mandated conference warranted, as a remedy under the circumstances of that action, the cancellation of the mortgage altogether.[103] The court cancelled the mortgage by asserting equitable powers, in response to the plaintiff bank's "inequitable, unconscionable, vexatious and opprobrious" behavior.[104] Professor Siegel hints that the drastic remedy that was imposed may reach an appellate court for review.[105]

CPLR 3408(g), as now enacted, requires plaintiffs in residential foreclosure actions to file notices of discontinuances and to vacate *lis pendens* within 150 days from the execution of any settlement agreement or loan modification.[106]

CPLR 3408(h), as now enacted, prohibits any party to a foreclosure action from charging the other party legal fees incurred in connection with the settlement conference itself.[107] This amendment appears to be directed at provisions of mortgages that impose legal fees upon mortgagors for various costs associated with defaults and the enforcement of mortgagees' rights.

## III. Perceived Pitfalls of CPLR 3408

While CPLR 3408 is a welcome addition to the family of New York's procedural statutes, one that performs a worthwhile social purpose, the statute's construction and wording raises certain discrete shortcomings. These shortcomings involve inconsistencies regarding how the sixty-day conference requirement is to be measured, the effect of proofs of service filed in connection with default motions, and the absence of mechanisms that might render the settlement conferences more productive.

### A. Measurement of the Sixty-Day Conference Requirement

CPLR 3408(a) provides a time frame within which the settlement conference mandated by the statute is to be held. It provides that the conference be conducted "within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties…"[108] The statute's measurement of the conference period—from the filing of proof of service with the clerk of the court—is an oddity, and it is unwise because, while certain methods of service of process in New York require the filing of proof of service, other methods do not.

More specifically, CPLR 308(2) permits service of process to be accomplished at a defendant's "actual place of business, dwelling place, or usual place of abode" by delivery of the summons to a person of suitable age and discretion, followed within twenty days by either a mailing to the defendant at his or her last known residence, or a first-class mailing to the defendant at his or her actual place of business in an unmarked envelope marked "personal and confidential."[109] When the "suitable age and discretion" method is used, the plaintiff is required to file proof of service with the clerk of the court within twenty days from the latter of such delivery or mailing, and service is deemed to be complete ten days after the filing.[110]

Likewise, if service cannot be accomplished with due diligence by either personal service or upon a person of suitable age and discretion, the plaintiff may utilize the colloquially-known "nail and mail" method set forth in CPLR 308(4), which also has a proof of service requirement.[111] This method requires that the summons be affixed to the door of the defendant's actual place of business, dwelling place, or usual place of abode, followed by a mailing to the defendant at his or her last known residence, or by a first-class mailing to the defendant's actual place of business

in an unmarked envelope marked "personal and confidential."[112] Like service under CPLR 308(2), the "nail and mail" method requires the filing of proof of service with the clerk of the court within twenty days of either the affixing or mailing, whichever is later, and service is deemed complete ten days after such filing.[113]

However, many actions are commenced in New York by means of personal service upon individual defendants as authorized by CPLR 308(1)[114] and by service upon a properly-designated agent as authorized by CPLR 308(3).[115] Neither of these methods require, in CPLR 308 or elsewhere, that the plaintiff file any proof of service with the court.[116]

Accordingly, in residential foreclosure actions where process is served upon the defendant and where proof of service need *not* be filed with the clerk of the court, CPLR 3408 contains no statutory trigger date for the scheduling of the mandatory settlement conference. Conceivably, in the absence of a statutory trigger mechanism, the settlement conference need not necessarily be scheduled at all. This flaw in legislative draftsmanship was probably not intended by the New York Legislature, as it potentially thwarts the purpose and intent of CPLR 3408 in instances where defendants in residential foreclosure actions are served personally or through a designated agent.

This flawed draftsmanship could have been avoided. In matrimonial actions, Uniform Rule 202.16(f) provides for an analogous requirement that a preliminary conference be held between the parties and the court "within 45 days after the action has been assigned."[117] The assignment of an action to a judge, by means of a Request for Judicial Intervention ("RJI"), must occur in matrimonial actions within forty-five days from the date of service upon the defendant of the summons with notice or summons and complaint.[118] The mandatory preliminary conference for matrimonial actions under Uniform Rule 202.16(f), therefore, in effect, establishes an outside date within which preliminary conferences must be conducted by the court. The purpose of Uniform Rule 202.16(f) is to assure that matrimonial actions, which often raise difficult and important issues such as child custody, visitation, *pendente lite* child support and maintenance, and the ultimate equitable distribution of marital assets, receive reasonably prompt attention from the courts.[119] Prompt preliminary conferences ensure that parties have an opportunity, early in their litigations, to stipulate to non-contested issues and to obtain court-ordered discovery schedules that shepherd the progress of the litigations. The scheduling of preliminary conferences in matrimonial actions, triggered by the filing of a deadlined RJI, is implemented in courts throughout the state without apparent problems or difficulties. Similarly, in actions for medical, dental and podiatric malpractice, CPLR 3406(a) requires the filing of a notice with the court within sixty days from the joinder of issue.[120] The purpose of the notice is to trigger an early conference with the court to discuss settlement, simplify issues, and schedule discovery.[121] There is no reason that the New York Legislature, in enacting CPLR 3408, could not also have required that settlement conferences be scheduled within a certain time period after a fixed date applicable to all foreclosure actions, such as from the filing of the plaintiff's summons and complaint or the joinder of issue. Instead, by measuring the scheduling period from the filing of proof of service, which may not even occur in certain cases, CPLR 3408 introduces an element of statutory uncertainty and potential confusion that could have been easily avoided.

This defect in legislative draftsmanship is partially mitigated by the Chief Administrative Judge's promulgation of Uniform Rule 202.12a[122] for residential mortgage foreclosure actions commenced on or after September 1, 2008.[123] Uniform Rule 202.12a applies to subprime, nontraditional, and high-cost home loans, as defined by RPAPL 1304 and Banking Law 6-*l*, entered into between January 1, 2003 and September 1, 2008. Thus, the rule is similar in scope to the Subprime Residential Loan and Foreclosure Laws of 2008 including, specifically, CPLR 3408.[124] Uniform Rule 202.12a requires that foreclosure plaintiffs covered by the rule file a specialized RJI "[a]t the time that proof of service of the summons and complaint is filed with the county clerk."[125] Uniform Rule 202.12a implements the procedure by which the mandatory settlement conferences are then scheduled, noticed, and conducted, in a manner consistent with and in furtherance of CPLR 3408.[126]

The one problem with Uniform Rule 202.12a, however, is that the specialized foreclosure RJI need not be filed by the plaintiff until the filing of the plaintiff's proof of service and, as noted, the filing of proof of service is not always required.[127] The reason that Uniform Rule 202.12a mitigates the problem is that plaintiffs cannot seek or obtain relief from the courts, such as by the filing of motions for summary judgment, except by first filing their RJIs. In the end, therefore, the Uniform Rule will accomplish its practical purpose of triggering the mandated settlement conference in all covered actions, either sooner or later in each covered action. Uniform Rule 202.12a is not as effective as its matrimonial counterpart, Uniform Rule 202.16(d), as the mortgage foreclosure rule places no fixed outside time limit on when the plaintiff's RJI must be filed in *all* cases, whereas the matrimonial rule requires the filing of an RJI within forty-five days from the service of the summons upon the defendant in every case.[128] In other words, Uniform Rule 202.16(d) will prove to be more effective in assuring the scheduling of prompt preliminary conferences for all matrimonial litigants than Uniform Rule 202.12a will be in assuring prompt settlement conferences for covered residential foreclosure litigants. The delay in scheduling and conducting settlement conferences in certain covered foreclosure actions will occur in

circumstances when plaintiffs are under no statutory obligation to file proofs of service under CPLR 308(1) and 308(3), and where no RJIs are filed until such times that plaintiffs are motivated to seek some form of affirmative relief from the courts.

Plaintiffs who might wish to avoid participation in conferences, calculating that their financial interests are furthered by foreclosures rather than settlements, can take no solace from the draftsmanship of CPLR 3408 or Uniform Rule 202.12a. At first blush, the wording of CPLR 3408 and Uniform Rule 202.12-a might provide such foreclosure plaintiffs with an incentive to serve process upon residential defendants only by methods that do not require the filing of proofs of service with the court, as a calculated means of circumventing the trigger event of the settlement conferences altogether. However, if such plaintiffs desire judgments of foreclosure and auctions of the foreclosed properties, as they ultimately do in commencing their actions, they must all eventually file RJIs. In turn, these filings will trigger the very mandated settlement conferences that the plaintiffs were trying to avoid.

Judges can further the letter and spirit of CPLR 3408 by assuring that if the RJI is filed by plaintiffs in conjunction with motions for affirmative relief, such as for summary judgment, the motions should be held in abeyance pending the completion of the mandated settlement conference. Such a rule would be consistent with the discretion that is afforded to trial judges to control their calendars.[129] Courts should not permit foreclosure plaintiffs to use summary judgment motions to circumvent the settlement conference procedures of CPLR 3408.

### B. Whether Proof of Service Filed in Support of a Default Motion Triggers a Mandatory Settlement Conference Under the Statute

As noted, when service of process is accomplished by either personal service or upon a designated agent, the CPLR does not impose upon plaintiffs any obligation to file proof of service with the clerks of the courts.[130] As also noted, the procedures of CPLR 3408 are written so that the statute's mandatory settlement conference is not triggered until the filing of proofs of service,[131] though courts have authority to schedule such conferences in any event.

If proof of service need not be filed with the clerk of the court, and if a defendant defaults by failing to appear in the action or answer the plaintiff's complaint, the remedy that is routinely undertaken by foreclosure plaintiffs is to file a motion seeking judgment on default.[132] One of the elements that must be proven in support of default judgments is proof of service of process upon the defendant.[133] Indeed, CPLR 3215(f) requires that all motions for default judgments contain evidence[134] proving that service of process has, in fact, been effected upon the defendant.[135] An issue that arises from such default motions, unique to foreclosure actions subject to CPLR 3408, is whether the inclusion of proof of service in the supporting papers constitutes a "filing of proof of service" with the clerk so as to trigger, under these circumstances, the mandatory settlement conference.

As of this writing, no reported decision has been rendered by any court that addresses this issue. There does not appear to be any persuasive reason on the face of the statute why proof of service contained in a default motion would not qualify as a filing of proof of service for purposes of CPLR 3408. While it is true that a defendant who is truly in default might not appear at any settlement conference that the court would schedule, CPLR 3408 is not designed to compel such an appearance; rather, it merely requires that these conferences be scheduled so that defendants have the *opportunity* to appear and participate in them. Apropos to the statute is the maxim that "you can lead a horse to water but you can't make him drink." The court's obligation under CPLR 3408(a) is to schedule the contemplated settlement conference, and to conduct the conference when the parties appear for it. Doing so fulfills the court's statutory obligations whether the defendant appears or defaults.

If, *arguendo*, evidence of proof of service attached to a default motion doubles as a "filing" of proof of service with the clerk of the court so as to mandate the scheduling of a settlement conference, then, necessarily, courts should hold such default motions in abeyance pending the scheduling of a conference at which the defendant may, or may not, appear. CPLR 3408 sets forth no minimum notice period; it only imposes a sixty-day maximum deadline measured from the filing of proof of service. Notice of a scheduled settlement conference while a default motion is held in abeyance, as with notice of all conferences generally, should be reasonable and transmitted by the court to an address calculated to advise the defendant of the date, time, and place of the conference. Any delays occasioned by the conference procedure to the prompt disposition of pending default motions would be expected in most instances to be reasonable and minor and would be outweighed by the intended benefit to the parties of potentially settling foreclosure actions in a restructured manner that may keep families in their homes.

### C. Does the Absence of a Conference Warrant the Vacatur of a Default Judgment?

Conceivably, a court could, through ministerial error, fail to schedule a settlement conference as mandated by CPLR 3408. In such a scenario, if a borrower does not appear and answer in a foreclosure action and a judgment of foreclosure is rendered on default, may the borrower obtain a vacatur of the judgment on the ground that the settlement conference opportunity was not provided? The short answer is no.

In New York, defendants who seek to vacate default judgments are

generally required under CPLR 5015 to meet a two-pronged test, the first being a reasonable excuse for the default,[136] and the second being the existence of a meritorious claim or defense.[137]

The failure of a court to schedule a settlement conference required by CPLR 3408 does not speak to the *reasons* underlying the defendant's failure to appear in an action and answer the plaintiff's complaint. Indeed, a defendant's failure to appear and answer after being served with process, and the failure to participate in a settlement conference with the court, are two very different things. A defendant seeking to vacate a default must establish a reasonable excuse for failing to appear and answer, which speaks to procedural obligations under the CPLR that are wholly independent of mandatory foreclosure settlement conferences.

In any event, even if a defendant in a foreclosure action establishes a reasonable excuse for failing to appear that somehow relates to the court's failure to schedule a settlement conference, the absence of the conference says nothing of the meritorious defense that must also be established for vacatur of the default. Defenses, meritorious or otherwise, may be discussed at settlement conferences. However, the absence of a conference itself is irrelevant to whether the defendant independently possesses a meritorious defense to a foreclosure action.

Accordingly, it is unlikely that the inadvertent failure of a court to offer a settlement conference under CPLR 3408 affords a defaulted defendant any practical relief. In the event that future defendants seek to vacate default judgments on the ground that they were not provided their mandatory settlement conference opportunity under the statute, it is predicted here that the vacatur of default judgments will be denied, unless such defendants can establish an entitlement to vacatur on other independent grounds.

### D. Whether the Settlement Conferences are Meaningful and Successful

In its proper context, CPLR 3408 is, for defendants, actually a second bite at the settlement apple. One of the provisions of the Subprime Residential Loan and Foreclosure Laws of 2008 is RPAPL 1304, which provides that, as a condition precedent to the commencement of a residential foreclosure action involving subprime, nontraditional, or high-cost mortgages, the lender must send the borrower a default notice, at least ninety days before the commencement of the action.[138] Such notices must advise the borrower that he or she is in danger of losing the home for non-payment, state the sum owed to cure the default, and list approved mortgage counseling agencies that are available in the area.[139] The obvious purpose of encouraging borrowers to consult with mortgage counseling services is for those service providers to assist in exploring potential re-finance options that seek to avoid the necessity of foreclosure actions. Foreclosure actions are commenced only against borrowers who fail to cure their defaults within the ninety-day notice period, with or without the assistance of a mortgage counselor. The mandatory settlement conference contemplated by CPLR 3408 is, therefore, the second settlement opportunity provided to borrowers by the Subprime Residential Loan and Foreclosure Laws. Any settlement that is reached at the conference should be memorialized in a clear, enforceable, written or transcribed agreement.[140]

A perceived pitfall of CPLR 3408 is that, while the statute mandates a settlement conference in residential foreclosure actions, there is no mechanism, beyond the conference itself, assuring that any meaningful accomplishments will arise from the effort. As noted, by the time of the conference, earlier settlement opportunities have, by definition, already failed. It cannot be reasonably expected that all or even most of the conferences will lead to a resolution of foreclosure litigations. However, CPLR 3408 provides that any counsel appearing for the mandatory settlement conference "shall be fully authorized to dispose of the case,"[141] likely written to help assure the seriousness and desired productivity of the conferences. The recent amendments to CPLR 3408 include the statute's new subdivision (f) that requires parties to negotiate in good faith at the settlement conferences,[142] which may be of marginal practical solace. Without doubt, the required residential foreclosure settlement conferences add to the workload of an already-overburdened judiciary. Each judge throughout the state may handle the conferences differently: either in chambers or in open court, on motion days or in special session, personally or through a law secretary, with or without meaningful negotiation.[143] The value of the conference will depend in any given instance upon a variety of factors including the facts of the case, the goals and reasonableness of the parties, and the negotiating experience and quality of the assigned judge and counsel.

While the New York State Office of Court Administration ("OCA") does not compile statewide foreclosure settlement conference statistics, it does capture statistical information for the larger counties in the greater New York City area.[144] Statistics for the period between approximately January 1, 2009 and September 30, 2009[145] reveal the following:[146]

| | Conferences Scheduled | Conferences Held | Defaults in Appearance | Settlements Reached |
|---|---|---|---|---|
| **Queens** | 1,871 | 1,130 | 768 | 83 |
| **Kings** | 1852 | 1300 | 552 | 82 |
| **Richmond** | 476 | 295 | 181 | 47 |
| **Bronx** | 1173 | 762 | 411 | 109 |
| **Nassau** | 2621 | 1390 | 1231 | 101 |
| **Suffolk** | 2181 | 622 | 1559 | 84 |
| **Westchester** | 1075 | 861 | 214 | 46 |

The statistics establish that for the settlement conferences that were scheduled, defendants failed to appear at scheduled settlement conferences between 19.9% (Westchester County) and 47% (Nassau County) of the time, with one aberrational exception where the default rate was 71.5% (Suffolk County). The mandatory settlement conference concept, therefore, provides no practical benefit to a significant portion of residential foreclosure cases, where the defendants fail to appear and participate.

The statistics also establish that, for the conferences attended by the parties, the settlement rate was 16% in Richmond County, 14% in Bronx County, 13.5% in Suffolk County, 7.5% in Queens County, 7.3% in Nassau County, 6.3% in Kings County, and 5.3% in Westchester County. When defaults are taken into account, the settlement rates for all cases scheduled for conferences drops to 10% in Richmond County, 9.3% in Bronx County, 4.4% in Queens and Kings Counties, 4.3% in Westchester County, and 3.9% in Nassau and Suffolk Counties. The success rate might appear modest in terms of overall percentages, but it is significant to the several hundreds of families whose homes were spared as a result of the settlement efforts overseen by the courts.

As a practical matter, settlements will not occur unless both parties are truly interested in reaching an arrangement that saves the borrower's home while meeting the legitimate financial interests of the lender. Settlements will also prove impossible when a borrower's financial circumstances have declined to where a proposed restructured payment schedule is not viable for the borrower. Typically, settlements will not be reached during the initial conference between the court and the parties, as the borrower must often provide further information to assist the lender in calculating an offer that restructures mortgage payments. The parties must, therefore, appear at the court on two or three occasions before any settlement can be finalized. The need for multiple conferences means that the statistics for settlements will often lag behind the statistics of the conferences that are shown to have been scheduled. Statistics maintained by certain counties reveal that the rate of adjournments is 73% in Nassau County, 66.3% in Westchester County, and 60% in Queens County.[147] The settlement success rate should be expected to ultimately exceed the current reported statistics, as these statistics do not reflect the significant number of cases for which scheduled settlement conferences have been adjourned or for continuing conferences that have not yet run their course.

Two authors on the subject suggest that CPLR 3408 could be rendered more meaningful if the settlement conference included a mediation component,[148] akin to that required under New Jersey's statewide Mortgage Stabilization and Relief Act[149] and the Housing Assistance and Recovery Program[150] that became effective on January 9, 2009.[151] In New Jersey, lenders that have commenced residential mortgage foreclosure actions are subject to a six-month forbearance period that prohibits efforts to remove the borrower from the property, during which time the lender and borrower are to participate in a non-binding court-sponsored mediation program.[152]

Another neighboring state, Connecticut, offers foreclosure litigants a mediation option as well.[153] Complaints in residential foreclosure actions must attach a notice form by which the borrower may request mediation.[154] The Connecticut court has three days from receipt of the request to notify the parties of the mediation,[155] which is to be held within fifteen days of its noticed scheduling[156] and completed within sixty days of the "return date" of the foreclosure action.[157] The State of Connecticut appropriated $2 million to fund its mediation program.[158]

## IV. The Appointment of Counsel for Those in Need

The intended importance of the foreclosure settlement conference is underscored by CPLR 3408(b), which provides that any defendant appearing for the conference *pro se* is "deemed" to have made an application for the appointment of counsel as a poor person.[159] In other words, the statute contains a legal presumption that an unrepresented defendant is a poor person seeking the appointment of counsel. The application for counsel invokes CPLR 1101.[160] CPLR 1101(a) requires, as a matter of procedure, that the *pro se* parties seeking assigned counsel file an affidavit setting forth their amount and sources of income, a listing of property owned and its value(s), their inability to pay the expenses of the litigation, the facts and nature of the action, and whether any other person who has a beneficial interest in the action is also unable to assist with litigation expenses.[161] The counsel provisions of CPLR 3408(b) and 1101(a) have the practical effect of requiring the court to make available in the courtroom the necessary forms that must be filled out for the *pro se* applicant to potentially meet the requirements for the appointment of counsel.

The court has discretion to grant or deny applications for appointed counsel.[162] Presumably, foreclosure defendants who receive appointed counsel would be entitled to the related benefits of CPLR 1102 that attach upon the appointment of counsel, such as the county's payment of stenographic transcript expenses and the waiver of court costs.[163]

When a defendant's application for assigned counsel is granted at the mandatory settlement conference, CPLR 3408(b) directs that the conference be continued on a later date for the appearance and participation of the assigned attorney.[164] The availability of a mechanism for the appointment of counsel to eligible defendants is significant. Defendants

subject to foreclosure upon the subprime, high-cost, and nontraditional mortgages contemplated by CPLR 3408 are likely to disproportionally represent poor and minority households.[165]

However, while CPLR 3408(b) created a statutory right to assigned counsel in covered mortgage foreclosure actions, the statute did not provide any underlying *funding* of assigned counsel. The statutory amendments enacted in 2009 likewise contain no funding for assigned counsel, and in fact declared the amendments to be revenue-neutral.[166] Courts that find defendants eligible for assigned counsel, therefore, refer defendants to legal service organizations, bar associations, and lists of available *pro bono* attorneys, but there is no guarantee that such referrals will actually result in attorney-client representation. The Brennan Center for Justice at New York University School of Law found that in Queens County between November 2008 and May 2009, 84% of defendants in foreclosure actions involving subprime, high-cost, and nontraditional mortgages were without full legal representation.[167] The figures for Richmond and Nassau Counties were estimated by the OCA as 91% and 92%, respectively.[168] These figures are not fully representative of reality, as they do not include instances of legal representation for "incidental" or "additional" defendants, nor do they account for the many defendants who default by failing to answer plaintiffs' complaints or who fail to attend the settlement conferences,[169] thereby skewing the percentages higher. The figures may also include *pro se* defendants who requested assigned counsel but were found to be ineligible for it.

The more accurate method of gauging the level of attorney representation at mandated residential foreclosure settlement conferences is to examine the number of cases where attorneys appear on behalf of defendants at conferences that are actually conducted. Recent OCA figures for Queens County (current to October 1, 2009) demonstrate that attorneys appeared on behalf of defendants in 570 of the 1,103 conferences that were conducted, representing 51.7% of those conferences.[170] Nevertheless, the percentages suggest that CPLR 3408(b) may not be sufficiently meeting its stated overall mission of providing legal representation to defendants facing the loss of their homes as a result of subprime, high-cost, and nontraditional mortgage foreclosures.

The counsel provision in CPLR 3408 is important, considering that the vast majority of foreclosure plaintiffs are institutions that commence the litigations through counsel. One responsibility of all attorneys is to assure a good faith basis for the actions they commence.[171] Moreover, once foreclosure actions are commenced, the lenders' attorneys often fast-track the litigations with motions for summary judgment under CPLR 3212. Appellate cases are legion that lenders establish their *prima facie* entitlement to summary judgment merely by evidencing to the court the mortgage, the unpaid note, and the borrower's default.[172] Since it is not uncommon for financial institutions to sell and assign mortgages and notes, a plaintiff that is an assignee must also tender evidence that it received the mortgage and note by a proper prior assignment.[173] The plaintiff's initial burden is not particularly difficult for institutional lenders to meet since it relies on readily-accessible documentation. Once the plaintiff's *prima facie* burden is met, the burden shifts to the borrower defendant to establish, through admissible evidence, the existence of a triable issue of fact as a defense to the action,[174] such as, but not limited to, waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff.[175] Counsel can be of crucial importance to defendants in navigating the summary judgment process.

The benefits of having counsel at foreclosure settlement conferences are also easy to imagine. Attorneys may advise defendants of potential legal defenses specifically related to, *inter alia*, the federal Truth in Lending Act ("TILA"),[176] the Real Estate Settlement Procedures Act ("RESPA")[177] and bankruptcy laws, the New York State Home Equity Theft Protection Act[178] and Deceptive Practices Act,[179] and statutory protections against high-cost home loans,[180] and may help renegotiate payment terms and assure that relevant legal procedures are followed.[181]

The availability of appointed counsel, of course, implicates federal and state funding for assigned legal services. An editorial published in the *New York Times* on October 9, 2009, lamented that funding for assigned counsel in home foreclosure litigations is not adequate and urged higher state and federal funding of programs earmarked for that purpose.[182] A bill has been introduced in the New York State Assembly—A00464—which, if enacted, will expand defendants' rights to assigned counsel.[183] A corresponding bill has yet to be sponsored in the New York State Senate, and, given New York's well-publicized budget difficulties, the future funding of assigned counsel in mortgage foreclosure actions may prove problematic.

*Pro bono* legal services are necessary to the success of CPLR 3408 in its current form. The New York City Bar Association ("NYCBA") and the Federal Reserve Bank have co-sponsored the Lawyers' Foreclosure Intervention Network ("LFIN"), which provides *pro bono* legal services for low-income homeowners facing foreclosure.[184] The program, administered by the NYCBA, trains volunteer attorneys to assist homeowners in (1) assessing their options, (2) negotiating their refinance arrangements, and (3) defending their cases.[185] A similar program, the Mortgage Foreclosure Pro Bono Project, has been established in Nas-

sau County through the collaboration of the County, the Attorney General's office, and Nassau/Suffolk Legal Services.[186] This program provides *pro bono* consultation services for homeowners in need.[187] *Pro bono* services will become less necessary only to the extent that the state finds funding for the increased demand for assigned counsel generated by the enactment of CPLR 3408.

## Conclusion

The latter part of 2008, along with 2009 and 2010, represent uncertain economic times. The burst of the "housing bubble" has been acknowledged as a significant factor in the downturn of the national economy.[188] The increase in mortgage foreclosures is a sign of the distressed housing market, and it impedes any recovery of that market specifically and the economy generally. Statutes that help reduce the number of foreclosure auctions and keep families in their homes can, theoretically, if not in fact, help stabilize the housing market and help families and communities.

CPLR 3408 provides a settlement conference mechanism to help achieve a laudable goal. It is the responsibility of the courts to properly navigate any procedural pitfalls presented by the statute's draftsmanship, such as issues involving the filing of proofs of service and RJIs, and to implement the purpose and intent of CPLR 3408 to the best extent possible. The availability and funding of assigned attorneys for financially-strapped defendants remains, as of this writing, a continuing problem. The courts' greatest contributions with regard to CPLR 3408 will be the expected investment of serious, proactive time and effort in the settlement conferences themselves, to restructure payment terms in a manner that is acceptable to all parties and that keeps families in their homes. This is true even if the rate of settlements arising out of the mandated conferences remains in the modest 5.3% to 16% range.

## Endnotes

1. Statistics provided by the New York State Unified Court System, Foreclosure Cases Filed, by county (2005-2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Foreclosures More than Doubled in 2008*, MSNBC, Jan. 15, 2009, http://www.msnbc.msn.com/id/28663624/.
7. Les Christie, *Foreclosures: Worst Three Months of All Time*, CNN, Oct. 15, 2009, http://money.cnn.com/2009/10/15/real_estate/foreclosure_crisis_ deepens/?postversion=2009101507. Care must be taken when examining foreclosure statistics, as some reported statistics focus upon only the number of homes actually sold at foreclosure auctions, whereas others—including those at issue here—include homeowners who merely receive default notices and auction notices, which precede foreclosure sales.
8. 2008 N.Y. Laws ch. 472. *See also* LaSalle Bank Nat'l Ass'n v. Novetti, 889 N.Y.S.2d 506, No. 6535-08, 2009 WL 1810511, at *2 (Sup. Ct. June 15, 2009) (unreported disposition); Wells Fargo Bank, NA v. Edsall, 880 N.Y.S.2d 877, No. 3523-07, 2009 WL 175029, at *3 (Sup. Ct. Jan. 22, 2009) (unreported disposition).
9. 2008 N.Y. Laws ch. 472. *See also Wells Fargo Bank, NA*, 2009 WL 175029, at *3.
10. *See* Michael Powell & Janet Roberts, *Minorities Hit Hardest as New York Foreclosures Rise*, N.Y. Times, May 16, 2009, at A1. *See also* Manny Fernandez, *In Confronting the Foreclosure Crisis, A Bill Strikes a Balance*, N.Y. Times, June 22, 2008, at A25.
11. While there is no statutory predecessor to CPLR 3408, the New York State Judiciary was ahead of the Legislature in recognizing the potential value of early settlement conferences in residential foreclosure actions. A report entitled Residential Mortgage Foreclosures: Promoting Early Court Intervention was issued in June 2008 by then-Chief Judge Judith Kaye and by Chief Administrative Judge Ann Pfau. The report recognized the significant spike in residential foreclosure actions filed in the State of New York and the effect of foreclosures upon families, neighborhoods, banks, and the economy. It summarized the creation of a pilot Early Foreclosure Conference Part in Queens County where, under local rules, homeowner defendants could request, pursuant to written notice served with the summons and complaint, a court conference. The conference was to be held within sixty days from the filing of a Request for Judicial Intervention, which was to be purchased at the time proof of service was filed with the clerk of the court. The purpose of the conference was to streamline foreclosure litigations for lenders and to encourage settlements between the parties. N.Y. State Unified Court Sys., Residential Mortgage Foreclosures: Promoting Early Court Intervention, at 2-4 [hereinafter N.Y. State Unified Court Sys. Report], *available at* http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf. The enactment of CPLR 3408 two months later, however, caused the pilot program to be subsumed by the procedures required by the state statute.
12. 2008 N.Y. Laws ch. 472, § 3; *Wells Fargo Bank, NA*, 2009 WL 175029, at *4.
13. *See* Sponsor's Mem., Bill Jacket, L.2008, ch. 472, *available at* http://image.iarchives.nysed.gov/images/images/142344.pdf. *See also LaSalle Bank Nat'l Ass'n*, 2009 WL 1810511, at *2; David D. Siegel, *Legislature Mandates Settlement Conference in Residential Foreclosure Actions in Effort to Ease Subprime Mortgage Crisis*, Siegel's Prac. Rev., Sept. 2008, at 3, *available at* 201 SIEGELPR 3 (WestLaw); Abby Tolchinsky & Ellie Wertheim, *Bringing Borrowers and Lenders Together Under Foreclosure Law*, N.Y. L.J., May 8, 2009, at 3.
14. N.Y. C.P.L.R. 3408(a) (McKinney 2009). *See also* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3408.
15. Siegel, *supra* note 13.
16. Melanca Clark & Maggie Barron, Brennan Ctr. for Justice, Foreclosures: A Crisis in Legal Representation 7-8 (2009), *available at* http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkx.pdf.
17. *Id.* at 7-8 (citing Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures* 17 (N.Y.U. Center for Law & Econ., Law & Econ. Research Paper Series, Working Paper No. 08-41, Sept. 18, 2008)). The paper correlates the proximity of foreclosures to reductions in home sales prices in the same areas.
18. *Id.* at 8 (citing generally William C. Apgar & Mark Duda, Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom (May 11, 2005)).
19. *Id.* (citing Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 Housing Stud. 851, 862 (2006)).
20. *Id.* (citing Pew Charitable Trusts, Defaulting on the Dream: States Respond to America's Foreclosure Crisis 2, 11 (2008); Homeownership Preservation Foundation, About Foreclosure, Common Myths, http://

www.995hope.org/about-foreclosure/common-myths/ (last visited Feb. 14, 2010)).

21. *See* N.Y. C.P.L.R. 3408(a) (McKinney 2009).
22. *Id.*
23. *Id.*
24. *Id.*; N.Y. BANKING LAW § 6-*l*(1)(d).
25. *See* Emigrant Mortgage Co., Inc. v. Turk, 895 N.Y.S.2d 722 (App. Div. 2010); Trustco Bank v. Alexander, 886 N.Y.S.2d 69, No. 2008-3351, 2009 WL 1425247, at *1 (Sup. Ct. May 12, 2009) (unreported disposition).
26. N.Y. REAL PROP. ACTS. LAW § 1304(5)(c).
27. *Id.* § 1304(5)(d).
28. *Id. See also* Accredited Home Lenders, Inc. v. Hughes, 866 N.Y.S.2d 860, 862-63 (Sup. Ct. 2008).
29. N.Y. REAL PROP. ACTS. LAW § 1304(5)(c).
30. *Id.* § 1304(5)(d).
31. *Id.* § 1304(5)(e); *Accredited Home Lenders, Inc.*, 866 N.Y.S.2d at 862.
32. N.Y. BANKING LAW § 6-*l*(1)(e).
33. *Id.* § 6-*l*(1)(e)(ii)-(v).
34. *Id.* § 6-*l*(1)(e)(i).
35. *Id.* § 6-*l*(1)(e).
36. *Id.* § 6-*l*(1)(d). *See generally* LaSalle Bank, N.A. II v. Shearon, 881 N.Y.S.2d 599, 604-06 (Sup. Ct. 2009).
37. N.Y. BANKING LAW § 6-*l*(1)(g)(i).
38. *Id.*
39. *Id.*
40. *Id.* § 6-*l*(1)(g)(ii). The statute provides for a deduction of up to two bona fide loan discount points payable by the borrower, if the interest rate from which the loan interest rate is discounted does not exceed by more than one percentage point the yield on U.S. treasury securities having comparable maturity measured from the fifteenth day of the month immediately preceding the month in which the application was received, *id.* § 6-*l*(1)(g)(ii)(1), and all bona fide loan discount points funded directly or indirectly through grants from federal, state, or local agencies or tax exempt organizations, *id.* § 6-*l*(1)(g)(ii)(2). Certain high-cost home loan practices are expressly prohibited by the BANKING LAW, including acceleration provisions absent default by the borrower, *id.* § 6-*l*(2)(a)), balloon payments that are more than twice as large as the average of earlier scheduled payments, *id.* § 6-*l*(2)(b), negative amortization by which regular periodic payments cause an increase in the principal balance, *id.* § 6-*l*(2)(c), interest rate increases as a result of the borrower's default, *id.* § 6-*l*(2)(d), the application of more than two periodic payments paid in advance from the borrower's loan proceeds, *id.* § 6-*l*(2)(e), fees for certain loan modifications, renewals, extensions or amendments, *id.* § 6-*l*(2)(f), oppressive mandatory arbitration clauses, *id.* § 6-*l*(2)(g), the financing of insurance or other defined products, *id.* § 6-*l*(2)(h), loan "flipping," *id.* § 6-*l*(2)(i), the refinancing of special mortgages, *id.* § 6-*l*(2)(j), lending without verification of the borrower's ability to repay, *id.* § 6-*l*(2)(k), lending without counseling disclosure, *id.* § 6-*l*(2)(*l*), the financing of points and fees, *id.* § 6-*l*(2)(m), the payment of home improvement contractors from loan proceeds, *id.* § 6-*l*(2)(n), the encouragement of the borrower's default, *id.* § 6-*l*(2)(o), payments to mortgage brokers other than for goods and facilities actually furnished or services actually performed, *id.* § 6-*l*(2)(p), points and fees for refinancing a high-cost home loan to a new high-cost home loan, *id.* § 6-*l*(2)(q), prepayment penalties, *id.* § 6-*l*(2)(r), abusive yield spread premiums, *id.* § 6-*l*(2)(s), the non-collection by the lender of tax and insurance escrow for loans to be consummated after July 1, 2010, *id.* § 6-*l*(2)(t), the non-disclosure by the lender of taxes and insurance, *id.* § 6-*l*(2)(u), and "teaser rates" having a duration of less than six months, *id.* § 6-*l*(2)(v). The statute provides for penalties in the form of consequential and incidental damages, civil penalties, and attorneys' fees, as well as equitable and injunctive relief, in the event that violations by lenders are proven by a preponderance of the evidence. *Id.* §§ 6-*l*(7) – (11). *See generally* LaSalle Bank, N.A. v. Shearon, 850 N.Y.S.2d 871 (Sup. Ct. 2008).
41. *See* Governor's Program Bill Mem., Summary of Provisions, Bill Jacket, L.2008, ch. 472.
42. *See* Siegel, *supra* note 13; Governor's Program Bill Mem., Summary of Provisions, Bill Jacket, L.2008, ch. 472; Press Release, Governor David A. Paterson, Governor Paterson Signs Comprehensive Reforms to Address Foreclosure Crisis (Aug. 5, 2008), *available at* http://www.ny.gov/governor/press/press_0805081.html.
43. Accredited Home Lenders, Inc. v. Hughes, 866 N.Y.S.2d 860, 862-63 (Sup. Ct. 2008).
44. *Id.*
45. *Id.* at 863.
46. 891 N.Y.S.2d 238 (Sup. Ct. 2009).
47. *Id.* at 243.
48. *See, e.g.*, Wells Fargo Bank, NA v. Edsall, 880 N.Y.S.2d 877, No. 3523-07, 2009 WL 175029, at *4 (Sup. Ct. Jan. 22, 2009) (unreported disposition).
49. N.Y. C.P.L.R. 3408(a) (McKinney 2009) (emphasis added); U.S. Bank, N.A. v. Flynn, No. 2010-20093, 2010 WL 936224, at *4 (Sup. Ct. Mar. 12, 2010).
50. 880 N.Y.S.2d 224, No. 226806, 2009 WL 211787 (Sup. Ct. Jan. 23, 2009) (unreported disposition).
51. *Id.* at *1-2.
52. *Id.* at *2.
53. *Id.*
54. *See, e.g.*, Antone v. Gen. Motors Corp., 64 N.Y.2d 20, 28 (1984).
55. Accredited Home Lenders, Inc. v. Hughes, 866 N.Y.S.2d 860, 863 (Sup. Ct. 2008).
56. *Id.* at 862.
57. *Id.*
58. *Id.*
59. *Id.* at 863.
60. *Id. See also* N.Y. REAL PROP. ACTS. LAW § 1304(1), (2) (McKinney 2009).
61. *Compare* N.Y. REAL PROP. ACTS. LAW § 1304(2) *with* N.Y. C.P.L.R. 3408(a).
62. *Accredited Home Lenders Inc.*, 866 N.Y.S.2d at 863.
63. *Id.*
64. *Id.*
65. *See, e.g.*, Jones v. Bill, 890 N.E.2d 884 (N.Y. 2008); Bluebird Partners L.P. v. First Fid. Bank, 767 N.E.2d 672, 674 (N.Y. 2002); Yong-Myun Rho v. Ambach, 546 N.E.2d 188, 190 (N.Y. 1989); Sutka v. Connors, 538 N.E.2d 1012, 1015 (N.Y. 1989); Janssen v. Inc. Vill. of Rockville Ctr., 869 N.Y.S.2d 572, 581-82 (App. Div. 2008); Ragucci v. Prof'l Constr. Servs., 803 N.Y.S.2d 139, 142 (App. Div. 2005) (quoting Majewski v. Broadalbin-Perth Cent. Sch. Dist., 696 N.E.2d 978, 980 (N.Y. 1998)).
66. *See, e.g.*, N.Y. STAT. LAW §§ 76, 94; Action Elec. Contractors, Inc. v. Goldin, 474 N.E.2d 601, 604 (N.Y. 1984). *See also* Ferres v. City of New Rochelle, 502 N.E.2d 972, 975 (N.Y. 1986); Uniformed Firefighters Ass'n, Local 94 v. Beekman, 420 N.E.2d 938, 941 (N.Y. 1981); Tutunjian v. Conroy, 865 N.Y.S.2d 768, 770 (App. Div. 2008); Kearns v. Piatt, 716 N.Y.S.2d 418, 419 (App. Div. 2000).
67. N.Y. C.P.L.R. 3408(a) (emphasis added).
68. *Id.*
69. *Id.* (emphasis added).
70. On occasion, plaintiffs in foreclosure actions file and serve motions for summary judgment in lieu of a complaint under CPLR 3213. *See, e.g.*, Dyck-O'Neal, Inc. v. Thomson, 868 N.Y.S.2d 838 (App. Div. 2008); Lakeville Manor, Inc. v. KBK Enters., LLC, 772 N.Y.S.2d 591 (App. Div. 2003); Gregorio v. Gregorio, 651 N.Y.S.2d 599 (App. Div. 1996); F.D.I.C. v. De Cresenzo, 616 N.Y.S.2d 638 (App. Div. 1994); Norton Co. v. C-TC 9th Ave. P'ship, 603 N.Y.S.2d 364 (App. Div. 1993); Joswick v. Rossi, 593 N.Y.S.2d 257 (App. Div. 1993); Stern v. Chemical Bank, 372 N.Y.S.2d 913, 916 (Civ. Ct. 1975). Such

motions may only be filed when the action is based upon an instrument for the payment of money—like a note—and cannot be used for equitable relief such as the court-ordered sale of the property and the eviction of the defendant. In foreclosure actions where the defendant is not subject to sale and eviction, the defendant would ordinarily not be a resident of the property. Accordingly, it would appear that in actions where plaintiffs seek summary judgment in lieu of a complaint under CPLR 3213, the absence of the defendant's residence in the property would render the settlement conference of CPLR 3408 inapplicable.

71. 2008 N.Y. Laws ch. 472, § 3.

72. *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3408. *See also* LaSalle Bank Nat'l Ass'n v. Novetti, 889 N.Y.S.2d 506, No. 6535-08, 2009 WL 1810511, at *2 (Sup. Ct. June 15, 2009) (unreported disposition).

73. *LaSalle Bank Nat'l Ass'n*, 2009 WL 1810511, at *2.

74. N.Y. C.P.L.R. 3408(a).

75. *Id.* 3408.

76. *Id.*

77. *See* N.Y. STAT. LAW § 51(b), (c). *E.g.*, Duell *ex rel.* Estate of Duell v. Condon, 647 N.E.2d 96, 100 (N.Y. 1995); Dorfman v. Leidner, 565 N.E.2d 472, 474 (N.Y. 1990); Thomas v. Bethlehem Steel Corp., 470 N.E.2d 831, 833 (N.Y. 1984); Beary v. City of Rye, 377 N.E.2d 453, 459 (N.Y. 1978); Deutsch v. Catherwood, 294 N.E.2d 193, 194 (N.Y. 1973); County of Herkimer v. Daines, 876 N.Y.S.2d 303 (App. Div. 2009), *leave to appeal denied*, 876 N.Y.S.2d 804 (App. Div. 2009); State *ex rel.* Spitzer v. Daicel Chem. Indus., 840 N.Y.S.2d 8, 10-11 (App. Div. 2007); Chapman v. State, 690 N.Y.S.2d 328 (App. Div. 1999); Wade v. Byung Yang Kim, 681 N.Y.S.2d 355, 356-57 (App. Div. 1998); Auger v. State, 666 N.Y.S.2d 760, 762 (App. Div. 1997), *after remand* 693 N.Y.S.2d 343 (App. Div. 1999); Morales v. Gross, 657 N.Y.S.2d (App. Div. 1997).

78. N.Y. C.P.L.R. 3408.

79. 889 N.Y.S.2d 506, No. 6535-08, 2009 WL 1810511, at *1 (Sup. Ct. June 15, 2009) (unreported disposition).

80. *Id.*

81. *Id.* at *1-2.

82. *Id.* at *2.

83. *Id.*

84. *Id.*

85. *See, e.g.*, Simonson v. Int'l Bank, 200 N.E.2d 427, 431-32 (N.Y. 1964); Jacobus v. Colgate, 111 N.E. 837, 838-39 (N.Y. 1916); State *ex rel.* Spitzer v. Daicel Chem. Indus., 840 N.Y.S.2d 8, 11 (App. Div. 2007); Mealing v. Hills, 517 N.Y.S.2d 321, 322 (App. Div. 1987); Cady v. County of Broome, 451 N.Y.S.2d 206 (App. Div. 1982); Linda I.V. v. Gil R.C., 673 N.Y.S.2d 290 (Fam. Ct. 1998); Ponterio v. Regan, 521 N.Y.S.2d 965, 966-67 (Sup. Ct. 1987).

86. *See* N.Y. STAT. LAW § 55 (McKinney 2009); Simonson v. Int'l Bank, 200 N.E.2d 427, 431-32 (N.Y. 1964); Chapman v. State, 690 N.Y.S.2d 328, 328 (App. Div. 1999); Wade v. Byung Yang Kim, 681 N.Y.S.2d 355, 357 (App. Div. 1998); Auger v. State, 666 N.Y.S.2d 760 (App. Div. 1997).

87. 2008 N.Y. Laws ch. 472, § 3-a.

88. *Id.*; LaSalle Bank Nat'l Ass'n v. Novetti, 889 N.Y.S.2d 506, No. 6535-08, 2009 WL 1810511, at *1 (Sup. Ct. June 15, 2009) (unreported disposition); Siegel, *supra* note 13.

89. 2008 N.Y. Laws ch. 472, § 3-a.

90. *Id. See also LaSalle Bank Nat'l Ass'n*, 2009 WL 1810511, at *1.

91. N.Y. C.P.L.R. 3408(c).

92. Specifically, CPLR 3408(c) provides that "[w]here appropriate, the court *may*" allow telephonic or video participation, which is language of discretion. *Id.* (emphasis added). *See* N.Y. STAT. LAW § 177(a) cmt.

93. At most, section 202.15 of the Uniform Rules for the New York State Trial Courts provides for audio-visual recording of witness depositions, pursuant to specific procedures set forth in the rule. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.15 (2010). *See also* Duncan v. 605 3rd Ave., LLC, 853 N.Y.S.2d 592 (App. Div. 2008); R.M. v. Dr. R., 59 N.Y.S.2d 906, No. 50364(U), 2008 WL 509092 (Sup. Ct. Feb. 26, 2008) (unreported disposition); *In re* Sawyer, 823 N.Y.S.2d 641, 645 (Sup. Ct. 2006); Parker v. Parker, 773 N.Y.S.2d 518, 523 (Sup. Ct. 2003); Fajardo v. St. Joseph's Med. Ctr., 746 N.Y.S.2d 779, 780 (Sup. Ct. 2002); Roche v. Udell, 588 N.Y.S.2d 76, 79-81 (Sup. Ct. 1992); Velasquez v. Columbia Presbyterian Med. Ctr., 522 N.Y.S.2d 416, 418 (Sup. Ct. 1987). Nevertheless, video-conference technology has also been utilized for witnesses at certain hearings and trials. *See, e.g.*, Dates v. Mundt, 771 N.Y.S.2d 740 (App. Div. 2004); Perez v. Hynes, 880 N.Y.S.2d 875, No. 50196(U), 2009 WL 305520 (Sup. Ct. Feb. 04, 2009) (unreported disposition); State v. Pedraza, 853 N.Y.S.2d 476, 478 (Sup. Ct. 2007); People v. Chase, 803 N.Y.S.2d 20, No. 51125(U), 2005 WL 1692330 (N.Y. County Ct. May 19, 2005) (unreported disposition), but in criminal trials the concept appears to conflict with the defendant's rights under the Confrontation Clause of the Sixth Amendment. *See* United States v. Yates, 438 F.3d 1307, 1314 (11th Cir. 2006); People v. Wrotten, 871 N.Y.S.2d 28, 37 (App. Div. 2008).

94. N.Y. C.P.L.R. 3408(c) (emphasis added).

95. New York State Senate, S66007: Relates to home mortgage loans, the crime of mortgage fraud, and appropriations to the NYS housing trust fund corporation, http://open.nysenate.gov/openleg/api/1.0/html/bill/S66007 (last visited Feb. 15, 2010); New York State Assembly, Summary – A40007, http://assembly.state.ny.us/leg/?bn=A40007 (last visited Feb. 15, 2010).

96. 2009 N.Y. Sess. Laws ch. 507, § 9 (McKinney); Press Release, Governor David A. Paterson, Governor Paterson Signs Comprehensive Foreclosure Legislation into Law (Dec. 15, 2009), *available at* http://www.state.ny.us/governor/press/press_12150901.html.

97. 2009 N.Y. Sess. Laws ch. 507, § 9(d) – (h) (McKinney).

98. *Id.* § 9(a).

99. Vesselin Mitey, *Strained Courts Brace for Influx of Foreclosure Conferences Under Law That Broadens Eligibility*, N.Y. L.J., Nov. 18, 2009, at 1.

100. *Id.*

101. 2009 N.Y. Sess. Laws ch. 507, § 25(e) (McKinney).

102. *Id.* § 9(f).

103. IndyMac Bank F.S.B. v. Yano-Horoski, 890 N.Y.S.2d 313, 319-20 (Sup. Ct. 2009).

104. *Id.* at 319.

105. David D. Siegel, *Invoking Equitable Powers, Court Cancels Mortgage and Note of Foreclosing Plaintiff for "Duplicity" and "Opprobrious Demeanor" in Failing to Cooperate at Conference*, SIEGEL'S PRAC. REV., Dec. 2009, at 1, *available at* 216 SIEGELPR 1 (WestLaw).

106. 2009 N.Y. Sess. Laws ch. 507, § 9(g) (McKinney).

107. *Id.* § 9(h).

108. N.Y. C.P.L.R. 3408(a) (McKinney 2009).

109. *Id.* 308(2). *See generally*, Charnin v. Cogan, 673 N.Y.S.2d 134, 135-36 (App. Div. 1998); Fed. Home Loan Mortgage Corp. v. Venticinque, 658 N.Y.S.2d 689 (App. Div. 1997); Melton v. Brotman Foot Care Group, 604 N.Y.S.2d 203 (App. Div. 1993); Donohue v. Schwartz, 570 N.Y.S.2d 542 (App. Div. 1991); Borges v. Entra Am., Inc., 801 N.Y.S.2d 230, No. 50845(U), 2005 WL 1355144, at *2 (N.Y. City Civ. Ct. May 9, 2005) (unreported disposition); Star Brite Painting, Inc. v. Dubie's Hot Spot Inc., 784 N.Y.S.2d 924, No. 50136(U), 2004 WL 503488, at *2 (N.Y. City Civ. Ct. Mar. 1, 2004) (unreported disposition).

110. N.Y. C.P.L.R. 308(2). *See generally* Weininger v. Sassower, 612 N.Y.S.2d 249 (App. Div. 1994); Bartlett v. Gage, 633 N.Y.S.2d 246, 248 (Sup. Ct. 1995). The failure of a party to file a timely proof of claim is not a jurisdictional defect, but is instead a mere irregularity that is curable by motion to the court. *See* N.Y. C.P.L.R. 2004; Zareef v. Lin Wong, 877 N.Y.S.2d 182 (App. Div. 2009); County of Nassau v. Gallagher, 828 N.Y.S.2d 445 (App. Div. 2006); Penachio v. Penachio, 812 N.Y.S.2d

592, 594 (App. Div. 2006); Koslowski v. Koslowski, 672 N.Y.S.2d 808 (App. Div. 1998); Hausknecht v. Ackerman, 662 N.Y.S.2d 567, 569-70 (App. Div. 1997); Bank of N.Y. v. Schwab, 467 N.Y.S.2d 415 (App. Div. 1983); Marazita v. Nelbach, 456 N.Y.S.2d 423 (App. Div. 1982).

111. N.Y. C.P.L.R. 308(4).

112. *Id. See generally* Feinstein v. Bergner, 48 N.Y.2d 234, 239 (1979); Comm'rs of State Ins. Fund v. Khondoker, 865 N.Y.S.2d 287, 288 (App. Div. 2008); Gantman v. Cohen, 618 N.Y.S.2d 100, 100-01 (App. Div. 1994); Schwartzman v. Musso, 607 N.Y.S.2d 953 (App. Div. 1994); Woods v. Balick, 603 N.Y.S.2d 1 (App. Div. 1993); Serrano v. Pape, 591 N.Y.S.2d 516 (App. Div. 1992); Magalios v. Benjamin, 554 N.Y.S.2d 61, 61 (App. Div. 1990); Tymkin v. Edwards, 551 N.Y.S.2d 126 (App. Div. 1990); Citibank, N.A. v. Keller, 518 N.Y.S.2d 409, 410 (App. Div. 1987); Ladell v. Field, 495 N.Y.S.2d 449, 450 (App. Div. 1985); Agin v. Krest Assocs., 599 N.Y.S.2d 367, 369 n.2 (Sup. Ct. 1992).

113. N.Y. C.P.L.R. 308(4). *See generally* Rosato v. Ricciardi, 571 N.Y.S.2d 633 (App. Div. 1991).

114. N.Y. C.P.L.R. 308(1). *See generally* Espy v. Giorlando, 436 N.E.2d 193 (N.Y. 1982); McGreevy v. Simon, 633 N.Y.S.2d 177, 178 (App. Div. 1995); Coyne v. Besser, 546 N.Y.S.2d 129 (App. Div. 1989); Velez v. Smith, 540 N.Y.S.2d 339 (App. Div. 1989); Jones v. Nossoughi, 537 N.Y.S.2d 565 (App. Div. 1989); Prof'l Billing Res., Inc. v. Haddad, 705 N.Y.S.2d 204, 207 (N.Y. City Civ. Ct. 2000); Bertha G. v. Paul T., 509 N.Y.S.2d 995, 996-97 (Fam. Ct. 1986).

115. N.Y. C.P.L.R. 308(3). *See generally* Jackson v. County of Nassau, 339 F. Supp. 2d 473, 477 (E.D.N.Y. 2004); *Espy*, 436 N.E.2d at 193; Donaldson v. Melville, 507 N.Y.S.2d 301, 302 (App. Div. 1986); Hall v. Bickweat, 584 N.Y.S.2d 690 (App. Div. 1992); *In re* Estate of Gottesman, 511 N.Y.S.2d 643, 644, (App. Div. 1989).

116. *Compare* N.Y. C.P.L.R. 308(1) & (3) *with* N.Y. C.P.L.R. 308(2) & (4).

117. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.16(f) (2004). Uniform Rule 202.12(b), which applies to other civil actions, has a similar forty-five day requirement for the scheduling of preliminary conferences measured from the purchase and filing of a Request for Judicial Intervention ("RJI"). N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12(b) (2009). In non-matrimonial actions, however, there is no deadline for the filing of an RJI. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.6(a) (2000).

118. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.16(d) (2004). The RJI must be purchased for a fee of $95.00. N.Y. C.P.L.R. 8020(a). CPLR 306-b requires that absent a court-approved extension, process must be made upon the defendant within 120 days from the filing of the plaintiff's summons with notice or summons and complaint. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 100-01 (2001). If a matrimonial plaintiff takes the full 120 days for service, followed by the full forty-five days for purchasing an RJI, and if the court conducts a preliminary conference forty-five days thereafter, the time frame for conducting the initial matrimonial conference is capped at 210 days from the action's commencement. As a practical matter, preliminary conferences in matrimonial actions are conducted well in advance of the mathematical calendar maximum.

119. *Cf.* Qi v. Ng, 632 N.Y.S.2d 757, 757 (Sup. Ct. 1995).

120. *See also* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.56(a)(1), (b); Sturleti v. Stigliano, 511 N.Y.S.2d 770, 770 (Sup. Ct. 1986).

121. *See* N.Y. C.P.L.R. 3406(a).

122. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12a (2008).

123. *Id.* § 202.12a(a).

124. The one noticeable difference between CPLR 3408 and Uniform Rule 202.12a is that the statute applies to covered actions commenced as of its effective date, August 5, 2008, whereas the Uniform Rule applies to covered actions commenced as of September 1, 2008. The chronological difference is marginal.

125. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12a(b).

126. *Compare id.* § 202.12a(c) *with* N.Y. C.P.L.R. 3408.

127. N.Y. C.P.L.R. 308(1), (3).

128. *Compare* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.12a(c) *with* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.16(d).

129. *See, e.g.*, Schreiber-Cross v. State, 870 N.Y.S.2d 438, 442 (App. Div. 2008).

130. N.Y. C.P.L.R. 308(1), (3).

131. *Id.* 3408(a).

132. *See id.* 3215(a).

133. *See, e.g.*, Oparaji v. Duran, 795 N.Y.S.2d 341 (App. Div. 2005). *Accord* N.Y. Mut. Underwriters v. Baumgartner, 797 N.Y.S.2d 210, 214 (App. Div. 2005); Ocuto Blacktop & Paving Co. v. Trataros Constr., 715 N.Y.S.2d 565 (App. Div. 2000); Green v. Dolphy Constr. Co., 590 N.Y.S.2d 238, 239 (App. Div. 1992).

134. The evidence typically contained in the moving papers is an affidavit of service. Conceivably, it could also include a written acknowledgment of service by the person served.

135. N.Y. C.P.L.R. 3215(f). *See generally* Mullins v. DiLorenzo, 606 N.Y.S.2d 161 (App. Div. 1993); Shapiro v. Rose, 600 N.Y.S.2d 819 (App. Div. 1993); Ice Sculpture Designs, Inc. v. Icebreakers, 836 N.Y.S.2d 493, No. 50194(U), 2007 WL340293, at *2 (Sup. Ct. Feb. 5, 2007) (unreported disposition); Tucker Family Trust v. Taylor, 836 N.Y.S.2d 490, No. 50087(U), 2007 WL 137112 (Sup. Ct. Jan. 18, 2007) (unreported disposition); Einheber v. Bodenheimer, 820 N.Y.S.2d 842, No. 51264(U), 2006 WL 1835019, at *3 (Sup. Ct. May, 5, 2006) (unreported disposition); Adkins v. Lipner, Gordon & Co., 814 N.Y.S.2d 559, No. 52073(U), 2005 WL 3487789, at *3 (Sup. Ct. Dec. 20, 2005) (unreported disposition); Jann v. Cassidy, 696 N.Y.S.2d 337 (Sup. Ct. 1999); Matthew v. Mosier, 832 N.Y.S.2d 408 (City Ct. 2007).

136. N.Y. C.P.L.R. 5015(a)(1). *E.g.*, Jones v. 414 Equities LLC, 866 N.Y.S.2d 165, 178 (App. Div. 2008); Apple Bank for Sav. v. Fort Tyron Apartments Corp., 843 N.Y.S.2d 307 (App. Div. 2007); State v. Williams, 843 N.Y.S.2d 722, 724 (App. Div. 2007); Knupfer v. Hertz Corp., 827 N.Y.S.2d 394,394 (App. Div. 2006); Nilt, Inc. v. N.Y. State Dep't of Motor Vehicles, 826 N.Y.S.2d 471 (App. Div 2006); Wilson v. Sherman Terrace Co-op, Inc., 787 N.Y.S.2d 318 (App. Div. 2005); Heskel's West 38th St. Corp. v. Gotham Constr. Co., 787 N.Y.S.2d 285 (App. Div. 2005); Smolinski v. Smolinski, 786 N.Y.S.2d 881 (App. Div. 2004); Taylor v. Saal, 771 N.Y.S.2d 671 (App. Div. 2004); Dominguez v. Carioscia, 766 N.Y.S.2d 685, 686 (App. Div. 2003); Sanford v. 27-29 W. 181st St. Ass'n, 753 N.Y.S.2d 49 (App. Div. 2002).

137. N.Y. C.P.L.R. 5015(a)(2). *See, e.g.*, Maines Paper & Food Serv., Inc. v. Boulevard Burgers Corp., 861 N.Y.S.2d 808, 810 (App. Div. 2008); Fladell v. Am. Red Magen David for Israel, 844 N.Y.S.2d 136 (App. Div. 2007); Vargas v. Ahmed, 837 N.Y.S.2d 654 (App. Div. 2007); ORT Assocs. v. Mouzouris, 836 N.Y.S.2d 62 (App. Div. 2007); Bollino v. Hitzig, 825 N.Y.S.2d 511 (App. Div. 2006); Rubenbauer v. Mekelburg, 803 N.Y.S.2d 183 (App. Div. 2005); Alaska Seaboard Partners v. Grant, 799 N.Y.S.2d 117 (App. Div. 2005); Compass Group, USA, Inc. v. Mazula, 795 N.Y.S.2d 395 (App. Div. 2005); Dodge v. Commander, 794 N.Y.S.2d 482 (App. Div. 2005); Wilson v. Sherman Terrace Co-op, Inc., 787 N.Y.S.2d 318 (App. Div. 2005); Merrill/N.Y. Co. v. Celerity Sys., Inc., 752 N.Y.S.2d 301 (App. Div. 2002); Barton v. Executive Health Exam'rs, 716 N.Y.S.2d 3 (App. Div. 2000).

138. N.Y. Real Prop. Acts. Law § 1304(1). The notice is to be sent by the lender via registered or certified mail. N.Y. C.P.L.R. 1304(2). Compliance with this and other laws must be affirmatively pleaded in the plaintiff's complaint. N.Y. Real Prop. Acts. Law § 1302(1).

139. N.Y. Real Prop. Acts. Law § 1304(1). When foreclosure actions are commenced, further warnings and advice must be provided to the borrower with the summons and complaint, as set forth in RPAPL 1303. *See* Countrywide Home Loans, Inc. v. Taylor, 843 N.Y.S.2d 495, 498

(Sup. Ct. 2007) (regarding a predecessor version of CPLR 1303).

140. N.Y. C.P.L.R. 2104. *Accord* Bruce J. Bergman, *Entertainment of Settlement Could Backfire on Lender*, N.Y. L.J., Dec. 31, 2008, at 5.

141. N.Y. C.P.L.R. 3408(c).

142. 2009 N.Y. Sess. Laws ch. 507, § 9(f) (McKinney).

143. *See* Tolchinsky & Wertheim, *supra* note 13, at 3.

144. E-mail from Paul Lewis, Esq., Office of Court Administration, to author (Oct. 20, 2009).

145. According to the OCA, different counties began keeping records and implementing procedures at different times, and the sixty-day conference period meant that the earliest conferences were not conducted until approximately January of 2009.

146. The statistics for Queens, Kings, Richmond, Bronx, Nassau, and Suffolk Counties were provided by the OCA via e-mail on October 20, 2009. The statistics for Westchester County were separately provided via e-mail by Nancy Barry, Esq., dated October 26, 2009.

147. Statistics provided by the OCA via e-mail on October 20, 2009 for Queens, Kings, Richmond, Bronx, Nassau, and Suffolk Counties. Westchester statistics separately provided via e-mail by Nancy Barry, Esq., dated October 26, 2009.

148. Tolchinsky & Wertheim, *supra* note 13.

149. 2008 N.J. Sess. Law Serv. ch. 127 (West) (codified at N.J. STAT. ANN. § 55:14K-1 to -82 (West 2009)).

150. 2008 N.J. Sess. Law Serv. ch. 127, §§ 9-14 (West) (codified at N.J. STAT. ANN. § 55:14K-88 to -93).

151. 2008 N.J. Sess. Law Serv. ch. 127 (West).

152. *See* Assembly Appropriations Committee Statement, N.J. STAT. ANN. § 55:14K-82 (West 2009). The concept of a forbearance period is being considered in the New York State Legislature. As of this writing, a bill is pending in the New York Assembly—A06756—which will, if enacted, amend RPAPL 1304 to impose a one-year foreclosure moratorium between the time the lender proves entitlement to a judgment and the court order that transfers title. The proposed legislation is expressly subject to a three-year sunset provision. No corresponding bill yet appears to be pending in the New York State Senate. *See generally* New York State Assembly, A06756 Summary, http://assembly.state.ny.us/leg/?bn=A06756 (last visited Feb. 15, 2010).

153. CONN. GEN. STAT. § 49-31*l*; 49-31m (2008).

154. *Id.* § 49-31*l*(c)(1).

155. *Id.* §§ 49-31*l*(c)(2); 49-31n(b)(1).

156. *Id.* § 49-31n(b)(2).

157. *Id.* § 49-31n(c)(1).

158. *See* N.Y. STATE UNIFIED COURT SYS. Report, *supra* note 11, at 9-10.

159. N.Y. C.P.L.R. 3408(b) (McKinney 2009).

160. *Id.*

161. *See generally* Teeter v. Reed, 395 N.Y.S.2d 282 (App. Div. 1977); *In re* S. Tier Legal Servs., 420 N.Y.S.2d 591 (Sup. Ct. 1979).

162. N.Y. C.P.L.R. 1101(a). *See also* Smith v. Smith, 2 N.Y.2d 120 (1956); Abbott v. Conway, 539 N.Y.S.2d 538 (App. Div. 1989); Bridges v. Univ. of Rochester, 468 N.Y.S.2d 732 (App. Div. 1983); Howell v. Francesco, 738 N.Y.S.2d 168 (Civ. Ct. 2001).

163. N.Y. C.P.L.R. 1102(b), (d). Conceivably, foreclosure actions within the jurisdictional limits of the Civil Courts could be brought in such courts, *see* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3408; N.Y. City Civ. Ct. Act 203, in which case the city would presumably assume expenses for stenographic transcripts. *See* N.Y. C.P.L.R. 1102(a).

164. N.Y. C.P.L.R. 3408(b).

165. Powell & Roberts, *supra* note 10; Fernandez, *supra* note 10.

166. New York State Senate, S66007: Relates to home mortgage loans, the crime of mortgage fraud, and appropriations to the NYS housing trust fund corporation, http://open.nysenate.gov/openleg/api/1.0/html/bill/S66007 (last visited Feb. 15, 2010) ("BUDGET IMPLICATIONS: This bill will not have an impact on State finances."); New York State Assembly, Summary – A40007, http://assembly.state.ny.us/leg/?bn=A40007 (last visited Feb. 15, 2010) ("BUDGET IMPLICATIONS: This bill will not have an impact on State finances.").

167. CLARK & BARRON, *supra* note 16, at 14.

168. *Id.*

169. *Id.* at 14 n.66.

170. Statistics provided by the OCA by e-mail on October 20, 2009 for Queens County, compiled from the Foreclosure Settlement Conference Part from October 2, 2008 to October 1, 2009.

171. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1a (2007).

172. *See, e.g.*, Emigrant Mortgage Co., Inc. v. Turk, 895 N.Y.S.2d 722 (App. Div. 2010); Cassara v. Wynn, 864 N.Y.S.2d 362 (App. Div. 2008), *leave to appeal dismissed*, 874 N.Y.S.2d 1 (2009); Countrywide Home Loans, Inc. v. Delphonse, 883 N.Y.S.2d 135 (App. Div. 2009); Wash. Mut. Bank, F.A. v. O'Connor, 880 N.Y.S.2d 696 (App. Div. 2009); Wells Fargo Bank, N.A. v. Webster, 877 N.Y.S.2d 200 (App. Div. 2009); Yildiz v. Vural Mgmt. Corp., 877 N.Y.S.2d 466 (App. Div. 2009); Aurora Loan Servs., LLC v. Thomas, 862 N.Y.S.2d 89 (App. Div. 2008); Rose v. Levine, 861 N.Y.S.2d 374 (App. Div. 2008); Popular Fin. Servs., LLC v. Williams, 855 N.Y.S.2d 581 (App. Div. 2008); U.S. Bank Nat'l Ass'n Tr. U/S 6/01/08 (Home Equity Home Trust 1998-2) v. Alvarez, 854 N.Y.S.2d 171 (App. Div. 2008); Charter One Bank, FSB v. Leone, 845 N.Y.S.2d 513 (App. Div. 2007); Aames Funding Corp. v. Houston, 843 N.Y.S.2d 660 (App. Div. 2007); Red Tulip, LLC v. Neiva, 842 N.Y.S.2d 1, 5 (App. Div. 2007); Wells Fargo Bank Minn., N.A. v. Mastropaolo, 837 N.Y.S.2d 247, 251-52 (App. Div. 2007); Daniel Perla Assocs. v. 101 Kent Assocs., 836 N.Y.S.2d 630 (App. Div. 2007); Witelson v. Jamaica Estates Holding Corp. I, 835 N.Y.S.2d 179 (App. Div. 2007); Cochran Inv. Co. v. Jackson, 834 N.Y.S.2d 198 (App. Div. 2007); Marculescu v. Ovanez, 815 N.Y.S.2d 598 (App. Div. 2006); Campaign v. Barba, 805 N.Y.S.2d 86 (App. Div. 2005); NC Venture I, L.P. v. Complete Analysis, Inc., 803 N.Y.S.2d 95, 98 (App. Div. 2005); Household Fin. Realty Corp. of N.Y. v. Winn, 796 N.Y.S.2d 533 (App. Div. 2005); LPP Mortgage, Ltd. v. Card Corp., 793 N.Y.S.2d 346 (App. Div. 2005); Fleet Nat'l Bank v. Olasov, 793 N.Y.S.2d 52 (App. Div. 2005); U.S. Bank Trust N.A. v. Butti, 792 N.Y.S.2d 505 (App. Div. 2005); Larkville Manor, Inc. v. KBK Enters., LLC, 772 N.Y.S.2d 591 (App. Div. 2004); Coppa v. Fabozzi, 773 N.Y.S.2d 604 (App. Div. 2004); Republic Nat'l Bank of N.Y. v. O'Kane, 764 N.Y.S.2d 635 (App. Div. 2003); Marshall v. Alaliewie, 757 N.Y.S.2d 162, 163 (App. Div. 2003); Tower Funding, Ltd. v. David Berry Realty, Inc., 755 N.Y.S.2d 413 (App. Div. 2003); M&T Mortgage Corp. v. Ethridge, 751 N.Y.S.2d 741 (App. Div. 2002); Credit-Based Asset Servicing & Securitization, LLC v. Grimmer, 750 N.Y.S.2d 673 (App. Div. 2002); EMC Mortgage Corp. v. Riverdale Assocs., 737 N.Y.S.2d 114 (App. Div. 2002); Fleet Bank v. Pine Knoll Corp., 736 N.Y.S.2d 737, 739 (App. Div. 2002); IMC Mortgage Co. v. Griggs, 733 N.Y.S.2d 918 (App. Div. 2001); Schantz v. O'Sullivan, 731 N.Y.S.2d 808 (App. Div. 2001); Paterson v. Rodney, 727 N.Y.S.2d 333 (App. Div. 2001); Sansone v. Cavallaro, 727 N.Y.S.2d 516 (App. Div. 2001); United Companies Lending Corp. v. Hingos, 724 N.Y.S.2d 134, 135 (App. Div. 2001); Republic Nat'l Bank of N.Y. v. Zito, 721 N.Y.S.2d 244 (App. Div. 2001); Simoni v. Time-Line, Ltd., 708 N.Y.S.2d 142 (App. Div. 2000); Delta Funding Corp. v. Yaede, 702 N.Y.S.2d 854 (App. Div. 2000); Sinardi v. Rivera, 689 N.Y.S.2d 236 (App. Div. 1999); First Union Nat'l Bank v. Weston, 689 N.Y.S.2d 543, 545 (App. Div. 1999); Hoffman v. Kraus, 688 N.Y.S.2d 575, 576 (App. Div. 1999); Mahopac Nat'l Bank v. Baisley, 664 N.Y.S.2d 345 (App. Div. 1997); Bercy Investors, Inc. v. Sun, 657 N.Y.S.2d 47 (App. Div. 1997); Fed. Home

Loan Mortgage Corp. v. Karastathis, 655 N.Y.S.2d 631 (App. Div. 1997); Chem. Bank v. Bowers, 643 N.Y.S.2d 653 (App. Div.1996); DiNardo v. Patcam Serv. Station, Inc., 644 N.Y.S.2d 779 (App. Div. 1996); N. Fork Bank v. Hamptons Mist Mgmt. Corp., 639 N.Y.S.2d 452 (App. Div.1996); Home Sav. Bank v. Schorr Bros. Dev. Corp., 624 N.Y.S.2d 53 (App. Div. 1995); Governor & Co. of the Bank of Ireland v. Dromoland Castle Ltd., 624 N.Y.S.2d 855 (App. Div. 1995); Zitel Corp. v. Fonar Corp., 619 N.Y.S.2d 964 (App. Div. 1994); Vill. Bank v. Wild Oaks Holding, Inc., 601 N.Y.S.2d 940 (App. Div. 1993); Silber v. Muschel, 593 N.Y.S.2d 306 (App. Div. 1993); Metro. Distrib. Servs. v. DiLascio, 574 N.Y.S.2d 755 (App. Div. 1991); Marton Asss. v. Vitale, 568 N.Y.S.2d 119, 121 (App. Div. 1991); Gateway State Bank v. Shangri-La Private Club for Women, 493 N.Y.S.2d 226 (App. Div. 1985), *aff'd*, 67 N.Y.2d 627 (1986).

173. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 13-105 (McKinney 2009). *See also* Wells Fargo Bank, N.A. v. Marchione, 887 N.Y.S.2d 615 (App. Div. 2009); LaSalle Bank Nat'l Ass'n v. Ahearn, 875 N.Y.S.2d 595, 597 (App. Div. 2009); Bankers Trust Co. v. Hoovis, 694 N.Y.S.2d 245, 247 (App. Div. 1999); 20 East 17th St. LLC v. 4 M Dev. Co., 666 N.Y.S.2d 912 (App. Div. 1998); Kluge v. Fugazy, 536 N.Y.S.2d 92 (App. Div. 1988); Bercy Investors, Inc. v. Sun, 657 N.Y.S.2d 47 (App. Div. 1997); RCR Servs. Inc. v. Herbil Holding Co., 645 N.Y.S.2d 76 (App. Div. 1996); Countrywide Home Loans, Inc. v. Taylor, 843 N.Y.S.2d 495, 497 (Sup. Ct. 2007).

174. *See* Nassau Trust Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265 (N.Y. 1982); State Bank of Albany v. Fioravanti, 417 N.E.2d 60 (N.Y. 1980); HSBC Bank USA v. Merrill, 830 N.Y.S.2d 598, 599 (App. Div. 2007); Wilmington Trust Co. v. Ajuda, 730 N.Y.S.2d 871 (App. Div. 2000); *Rose*, 861 N.Y.S.2d at 374; *Alvarez*, 854 N.Y.S.2d at 171; *Leone*, 845 N.Y.S.2d at 513; *Neiva*, 842 N.Y.S.2d at 6; *Houston*, 843 N.Y.S.2d at 660; *Jackson*, 833 N.Y.S.2d at 542; LaSalle Bank N.A. v. Kosarovich, 820 N.Y.S.2d 144, 145 (App. Div. 2006); Household Fin. Realty Corp. of N.Y. v. Winn, 796 N.Y.S.2d 533 (App. Div. 2005); *Olasov*, 793 N.Y.S.2d at 52; *Butti*, 792 N.Y.S.2d at 505; *Marshall*, 757 N.Y.S. at 163; *Etheridge*, 751 N.Y.S.2d at 741-42; *EMC Mortgage Corp.*, 737 N.Y.S.2d at 114; *Fleet Bank*, 736 N.Y.S.2d at 739; *Schantz*, 731 N.Y.S.2d 808-09; *Paterson*, 727 N.Y.S.2d at 333; *Sansone*, 727 N.Y.S.2d at 517; *Hingos*, 724 N.Y.S.2d at 135; Credit Based Asset Servicing & Securitization v. Castelli, 711 N.Y.S.2d 624, 625 (App. Div. 2000); *Simoni*, 708 N.Y.S.2d at 142; *Weston*, 689 N.Y.S.2d at 544; Green Point Sav. Bank v. Spivey, 676 N.Y.S.2d 228 (App. Div. 1998); Trustco Bank, Nat'l Ass'n v. Labriola, 667 N.Y.S.2d 450 (App. Div. 1998); *Baisley*, 664 N.Y.S.2d at 346; *Bercy Investors, Inc.*, 657 N.Y.S.2d at 47; *Karastathis*, 655 N.Y.S.2d at 630; *DiNardo*, 644 N.Y.S.2d at 779; *N. Fork Bank*, 639 N.Y.S.2d at 452; Naugatuck Sav. Bank v. Gross, 625 N.Y.S.2d 572 (App. Div. 1995); *Zitel*, 619 N.Y.S.2d at 964; *Vill. Bank*, 601 N.Y.S.2d at 940; *DiLascio*, 574 N.Y.S.2d at 755; *Vitale*, 568 N.Y.S.2d at 120.

175. *See, e.g.*, *Nassau Trust Co.*, 56 N.Y.2d at 183; State Bank of Albany v. Fioravanti, 417 N.E.2d 60, 64 (N.Y. 1980); Ferlazzo v. Riley, 16 N.E.2d 286 (N.Y. 1938); Kitain v. Windley, 724 N.Y.S.2d 641 (App. Div. 2001); Aurora Loan Servs., LLC v. Thomas, 862 N.Y.S.2d 89 (App. Div. 2008); U.S. Bank Nat'l Ass'n Tr. U/S 6/01/08 (Home Equity Loan Trust 1998-2) v. Alvarez, 854 N.Y.S.2d 171 (App. Div. 2008); Cochran Inv. Co. v. Jackson, 834 N.Y.S.2d 198 (App. Div. 2007); Sansone v. Cavallaro, 727 N.Y.S.2d 516, 517 (App. Div. 2001); First Union Nat'l Bank v. Weston, 689 N.Y.S.2d 543, 545 (App. Div. 1999); Sinardi v. Rivera, 689 N.Y.S.2d 236 (App. Div. 1999); Hoffman v. Kraus, 688 N.Y.S.2d 575 (App. Div. 1999); EBC Amro Asset Mgmt. Ltd. v. Kaiser, 681 N.Y.S.2d 539 (App. Div. 1998); 192 Sheridan Corp. v. O'Brien, 676 N.Y.S.2d 351 (App. Div. 1998); Mahopac Nat'l Bank v. Baisley, 664 N.Y.S.2d 345 (App. Div. 1997); N. Fork Bank v. Hamptons Mist Mgmt. Corp., 639 N.Y.S.2d 452 (App. Div. 1996); River Bank Am. v. Daniel Equities Corp., 624 N.Y.S.2d 287, 289 (App. Div. 1995); Mass. Mut. Life Ins. Co. v. Transgrow Realty Corp., 475 N.Y.S.2d 418 (App. Div. 1984); Fremont Inv. & Loan v. Haley, 889 N.Y.S.2d 505, No. 51186(U), 2009 WL 1636915, at *1 (Sup. Ct. June 11, 2009) (unreported disposition).

176. Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601 to 1667f (2006)). TILA was enacted to "assure a meaningful disclosure of credit terms so that [consumers] will be able to compare more readily the various credit terms available to [them] and avoid the uninformed use of credit." Deutsche Bank Nat'l Trust v. West, 22 Misc.3d 1132(A), No. 38830/07, 2009 WL 606661, at *1 (N.Y. Sup. Ct. Feb. 10, 2009) (citing Fiorenza v. Fremont Inv. & Loan, No. 08-858, 2008 WL 2517139 (S.D.N.Y. June 20, 2008)). *See generally* Mortgage Elec. Registration Sys., Inc. v. Maniscalco, 848 N.Y.S.2d 766 (App. Div. 2007); JP Morgan Chase Bank v. Tecl, 808 N.Y.S.2d 432 (App. Div. 2005); Delta Funding Corp. v. Murdaugh, 774 N.Y.S.2d 797 (App. Div. 2004); Bankers Trust Co. of Cal., N.A. v. Ward, 703 N.Y.S.2d 504 (App. Div. 2000); Berkeley Fed. Bank & Trust, FSB v. Siegel, 669 N.Y.S.2d 334 (App. Div. 1998); Horowitz v. Griggs, 666 N.Y.S.2d 480 (App. Div. 1997); First Trust Nat'l Ass'n v. Chiang, 662 N.Y.S.2d 136 (App. Div. 1997); HSBC Bank USA v. Picarelli, 889 N.Y.S.2d 882, No. 51107(U), 2009 WL 1585773 (Sup. Ct. Apr. 14, 2009) (unreported disposition); LaSalle Bank, NA v. Shearon, 881 N.Y.S.2d 599, 602 (Sup. Ct. 2009); Sutherland v. Remax 2000, 20 Misc.3d 1131(A), No. 51701(U), 2008 WL 3307201 (N.Y. Sup. Ct. Aug. 7, 2008) (unreported disposition); Fremont Inv. & Loan v. Edwardsen, 867 N.Y.S.2d 374, No. 51349(U), 2008 WL 2653287 (Sup. Ct. June 18, 2008); Collier v. Home Plus Assocs., 856 N.Y.S.2d 497, No. 52526(U), 2007 WL 4793201 (Sup. Ct. Dec. 21, 2007) (unreported disposition); Aurora Loan Servs. v. Grant, 851 N.Y.S.2d 56, No. 51793(U), 2007 WL 2768915 (Sup. Ct. Aug. 29, 2007) (unreported disposition); Beneficial Homeowner Serv. Corp. v. Butler, 836 N.Y.S.2d 491, No. 50278(U), 2007 WL 5192276 (Sup. Ct. Feb. 16, 2007) (unreported disposition); Bank of N.Y. v. Walden, 751 N.Y.S.2d 341 (Sup. Ct. 2002); Bankers Trust v. McFarland, 743 N.Y.S.2d 804 (Sup. Ct. 2002); Bankers Trust Co. of Cal. v. Payne, 730 N.Y.S.2d 200 (Sup. Ct. 2001); Gender Servs., Inc. v. Johnson, 439 N.Y.S.2d 794 (Sup. Ct. 1981).

177. Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601-17 (2006)). RESPA requires mortgage lenders and mortgage brokers, to the extent they are not the lender's exclusive agent, to disclose costs associated with federally-related mortgage loans at real estate closings, typically through the use of a standard "HUD-1" form. 12 U.S.C §§ 2603, 2604(c) (2006). *See also* 24 C.F.R. § 3500.7 (2009). *See generally* Fremont Inv. & Loan v. Haley, 889 N.Y.S.2d 505, No. 135592007, 2009 WL 1636915 (Sup. Ct. June 11, 2009) (unreported disposition); Cruz v. HSBC Bank, N.A., 21 Misc.3d 1143(A), No. 100629/2008, 2008 WL 5191428 (Sup. Ct. Nov. 12, 2008) (unreported disposition); Sutherland v. Remax 2000, 20 Misc.3d 1131(A), No. 22405/2007, 2008 WL 3307201 (Sup. Ct. Aug. 7, 2008) (unreported disposition); Bankers Trust v. McFarland, 743 N.Y.S.2d 804 (Sup. Ct. 2002).

178. Home Equity Theft Protection Act, 2006 N.Y. Sess. Laws ch. 308 (codified as amended at N.Y. BANKING LAW § 595-a (McKinney 2009)); N.Y. REAL PROP. LAW § 265-a). The law is intended to protect homeowners in financial distress—particularly those who are poor, elderly, or financially unsophisticated—from selling their home equity for a fraction of its fair market value as a result of misrepresentations, deceit, intimidation, or other unreasonable commercial practices by equity purchasers. N.Y. REAL PROP. LAW § 265-a(1)(a). The statute provides that the terms and conditions of equity purchases be set forth in written agreements that must conform with statutory requirements regarding print size, the identity of parties, the consideration recited, the description

of the mortgaged property, terms of payment, terms of lease or reconveyance, notice of cancellation, and duration. *Id.* § 265-a(3)-(7). Non-compliance with the provisions of RPL 265-a precludes equity purchasers from obtaining or enforcing judgments of foreclosure and sale for the property. *See* First Nat'l Bank of Chicago v. Silver, No. 2010-02511, 2010 WL 1078805 (N.Y. App. Div. Mar. 23, 2010) (holding that a plaintiff mortgagee's service of the statutorily-specific HETPA notice upon the defendant mortgagor with the summons and complaint is a condition precedent that must be affirmatively pleaded and proven, and that the mortgagee's failure to do so requires the dismissal of the foreclosure proceeding); WMC Mortgage Corp. v. Thompson, 877 N.Y.S.2d 885, 886 (Sup. Ct. 2009); Deutsche Bank Trust Co. Ams. v. Eisenberg, 890 N.Y.S.2d 368, No. 51271(U), 2009 WL 1789407 (Sup. Ct. June 23, 2009) (unreported disposition); HSBC Bank USA, N.A. v. Boucher, No. 27200-2008, 2009 WL 2355630 (N.Y. Sup. Ct. 2009) (unreported disposition); Wash. Mut. Bank v. Sholomov, 862 N.Y.S.2d 890, 893-94 (Sup. Ct. 2008); Countrywide Home Loans, Inc. v. Taylor, 843 N.Y.S.2d 495, 498-99 (Sup. Ct. 2007). *But see* Trustco Bank v. Alexander, 23 Misc. 3d 1129(A), No. 2009-50996(U), 2009 WL 1425247 (N.Y. Sup. Ct. May 9, 2009) (unreported disposition).

179. N.Y. GEN. BUS. LAW § 349. The statute prohibits consumer-orientated acts or practices that are misleading in a material way and which cause injury to the party seeking relief, Stutman v. Chemical Bank, 95 N.Y.2d 24 (2000); N.Y. Univ. v. Cont'l Ins. Co., 662 N.E.2d 763 (N.Y. 1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741 (N.Y. 1995); Negrin v. Norwest Mortgage, 700 N.Y.S.2d 184 (App. Div. 1999), and has been raised in mortgage foreclosure actions wherein the loan is alleged to be predatory. *See generally* Delta Funding Corp. v. Murdaugh, 774 N.Y.S.2d 797 (App. Div. 2004); Schimenti v. Whitman & Ransom, 617 N.Y.S.2d 742 (App. Div. 1994); Wells Fargo Bank, N.A. v. Robinson, 25 Misc.3d 1211(A), No. 52029(U), 2009 WL 3210306 (N.Y. Sup. Ct. Oct. 7, 2009); Cruz v. HSBC Bank, N.A., 21 Misc.3d 1143(A), No. 5191428, 2008 WL 5191428, at *2 (N.Y. Sup. Ct. Nov. 12, 2008) (unreported disposition); Fremont Inv. & Loan v. Laroc, Misc.3d 1124(A), No. 52166(U), 2008 WL 4764809 (Sup. Ct. Oct. 8, 2008) (unreported disposition); Banc of Am. Commercial Fin. Corp. v. Issacharoff, 728 N.Y.S.2d 861 (Sup. Ct. 2000).

180. N.Y. BANKING LAW § 6-*l*(1) (McKinney 2009).

181. *See* CLARK & BARRON, *supra* note 16, at 17-25.

182. Editorial, *Another Kind of Foreclosure Crisis*, N.Y. TIMES, Oct. 9, 2009, at A30. *See also* CLARK & BARRON, *supra* note 16, at 28-30.

183. New York State Assembly, Summary - A00464, http://assembly.state.ny.us/leg/?bn=A00464 (last visited Feb. 15, 2010).

184. N.Y. STATE UNIFIED COURT SYS. Report, *supra* note 11, at 5. *See also* Foreclosure Project: Overview, http://www.nycbar.org/citybarjusticecenter/projects/economic-justice/foreclosure-project/overview (last visited Oct. 16, 2009).

185. N.Y. STATE UNIFIED COURT SYS. Report, *supra* note 11, at 5.

186. *Id.* at 6.

187. Nassau County Bar Association, Legal Services, Mortgage Foreclosure Legal Consultation Clinics, http://www.nassaubar.org/For%20The%20Public/Legal_Services.aspx (last visited Mar. 29, 2010).

188. *See, e.g.*, Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, WALL ST. J., Apr. 6, 2009, at A15.



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# Because Rule 5.7(c) Was Not Adopted, It Is Not Consentable for a Lawyer to Refer a Client to the Lawyer's Title Abstract Company

By Kenneth F. Jurist

In an article which appeared in the Spring 2010 issue of the *N.Y. Real Property Law Journal*, the argument is made that the New York Rules of Professional Conduct and the Comments thereto (the "Rules" and the "Comments," respectively) permit a lawyer representing a party in a real estate transaction to also have an interest in an abstract company providing non-ministerial services in the same transaction, so long as the client is provided with appropriate disclosure and advice, and consents thereto.[1] For the reasons described below, I respectfully disagree with that argument and would caution members of the bar against engaging in such activities.

The Appellate Division of the New York State Supreme Court adopted the Rules effective as of April 1, 2009.[2] The Rules replaced the New York Code of Professional Responsibility, which became effective in New York as of January 1, 1970 (the "Code").[3]

In 1983, the American Bar Association introduced the Model Rules of Professional Conduct (the "Model Rules"). As a result of certain amendments to the Code thereafter adopted, many concepts contained within the Model Rules were incorporated into the Code. Though significant differences between the two exist, the Rules embrace the structure and substance of the Model Rules. Accordingly, many rules and definitions found in the Code are repeated in the Rules with little or no change thereto (each disciplinary rule set forth in the Code is hereinafter referred to as a "DR" and collectively as the "DRs" and each disciplinary rule set forth in the Rules is hereinafter referred to as a "Rule").[4]

The New York State Bar Association (hereinafter, the NYSBA or the "Bar Association") published the Comments, as well as a Preamble and Scope to the Rules, to provide guidance to attorneys in complying with the Rules. When adopting the Rules, the Appellate Division did not enact the Preamble, Scope or the Comments (notwithstanding the Bar Association's specific request that the Court adopt the Comments). In recognition thereof, the Bar Association has advised practitioners that "[w]here a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls."[5]

Rule 5.7 is entitled "Responsibilities Regarding Nonlegal Services." As adopted by the Appellate Division, it is substantively identical to DR 1-106.[6] The initial draft of Rule 5.7, however, prepared by the Bar Association's Committee on Standards of Attorney Conduct (COSAC) and (with minor changes) subsequently approved by the Bar Association (hereinafter, "Proposed Rule 5.7"), included an additional paragraph not adopted by the Appellate Division. That paragraph (hereinafter, "Proposed Paragraph (c)" or "Proposed Rule 5.7 (c)") provided as follows:

> A lawyer or law firm shall not, whether directly or through an affiliated entity, provide both legal and nonlegal services to a client in the same matter or in substantially related matters unless (i) the lawyer or law firm complies with Rule 1.8(a) regarding the provision of the nonlegal services, (ii) the lawyer or law firm reasonably believes it can provide competent and diligent representation to the client, and (iii) the client gives informed consent, confirmed in writing.[7]

## Formal Opinions 752, 753 and 755

The Reporters' Notes accompanying Proposed Rule 5.7, prepared by the ethics professor serving as the Associate Reporter for the COSAC subcommittee considering Rule 5.7, described Proposed Paragraph (c) as constituting a rejection by the Bar Association of Formal Opinions 752, 753 and 755 previously issued by the Bar Association's Committee on Professional Ethics (the "Ethics Committee").[8]

In Opinion 752, issued February 22, 2002, the Ethics Committee responded to a question as to whether its previously issued opinions which held "that in some transactions—notably real estate transactions—a lawyer who also operates certain ancillary businesses may not provide both legal and nonlegal services in the same transaction, *even with the informed consent of the client*" (emphasis added) continued to apply following the then recent adoption of DR 1-106. Those previous opinions included multiple opinions in which it was found that a lawyer could not represent a party in a transaction in which the lawyer or his or her spouse acted as a real estate broker. They also included (1) N.Y. State 621 (1991), in which the Ethics Committee adhered to its decision in N.Y. State 595 (1988) finding that "*a prohibited conflict of interest arises that may not be cured by the consent of those concerned*" (emphasis added) where a lawyer proposes

to refer clients to an abstract company which would provide non-ministerial services in the same transaction, and (2) N.Y. State 738 (2001), in which the Ethics Committee concluded that "*the fact that the title abstract agency to which a lawyer refers a real estate client is owned, in whole or in part, by the lawyer's spouse, does not insulate the lawyer from the reach of N.Y. State 595 and N.Y. State 621*" (emphasis added).[9]

As indicated above, DR 1-106, entitled "Responsibilities Regarding Non-legal Services," is substantively identical to Rule 5.7 as adopted by the Appellate Division.[10] DR 1-106(A)(4) provided (and Rule 5.7(a)(4) now provides), that the presumption that a person receiving nonlegal services believes those services to be the subject of a client-lawyer relationship (making those nonlegal services subject to the Code and now the Rules) can be overcome if "the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services."[11]

In determining that the adoption of DR 1-106 did not overturn its previous opinions finding that the provision of certain legal and nonlegal services in the same transaction is non-consentable, the Ethics Committee concluded that even if the steps described in the aforesaid DR 1-106(A)(4) were followed, thereby overcoming the presumption that those *nonlegal* services were subject to the Code, the attorney still remained subject to those DRs governing the provision of *legal* services. Those DRs included DR 5-101(A) (on which those previous opinions were based) which provided that:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client *will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests*, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest (emphasis added).[12]

Thus, notwithstanding the adoption of DR 1-106 (now Rule 5.7), it remained the Ethics Committee's position, as stated in N.Y. State 595, that, with respect to the activities which were the subject of its prior opinions, "*the type and kind of conflict posed is so significant that the provision of consent is inadequate to protect the client interests which converge with the law firm's business as an abstract company*" (emphasis added).[13]

In N.Y. State 753, issued February 26, 2002, the Ethics Committee confirmed its Opinion in N.Y. State 752 and went on to clarify what constituted ministerial services provided by an abstract company.[14]

In N.Y. State 755, issued April 10, 2002, the Ethics Committee concluded that the satisfaction of the disclosure, advice and consent elements of DR 1-106 will satisfy the requirements of DR 5-104 which are necessary to result in the referral of business by an attorney to an abstract company in which that attorney has an interest not being subject to the prohibitions against business transactions between a lawyer and a client set forth in DR 5-104. The Ethics Committee, however, reiterated its findings in N.Y. State 752 that such transaction must not violate DR 5-101 A.[15]

## The Comments

Proposed Rule 5.7 included proposed Comments thereto which made specific reference to Proposed Paragraph (c). Proposed Comment [5] to Proposed Rule 5.7 began with the phrase "[p]aragraph (c) recognizes that" and both proposed Comments [6] and [7] to Proposed Rule 5.7 included the statement that they were made "in the context of paragraph (c)."

Notwithstanding that the Appellate Division did not include Proposed Paragraph (c) when it adopted Rule 5.7, the aforesaid Comments [5], [6] and [7] remained a part of the final Comments to the final version of Rule 5.7. Each of said Comments, though, was modified to delete any reference to Proposed Paragraph (c).[16]

In the aforementioned article appearing in the *N.Y. Real Property Law Journal*, the argument is made that based on (1) "Commentary" to Proposed Paragraph (c) provided by COSAC when the Rules were first proposed in 2005, (2) certain language in Comment [5B] to the final version of Rule 5.7, and (3) certain language in the aforementioned Scope §§ [13] and [6], an attorney, with proper disclosure and consent, is able to provide in the same transaction those legal and nonlegal services which the aforesaid Opinions 752, 753, 755 held could not be so combined even with client consent. That argument is supported by neither the Rules as adopted nor said Commentary. Moreover, it is not shared by the parties involved in the preparation of the Comments or the adoption of the Rules.

Proposed Paragraph (c) sought to effectuate a significant change in the rules of ethics governing attorneys in New York and the opinions interpreting those rules. As the Reporters' Notes indicated when the Rules were first proposed, "*[t]he effect of this provision would be to legislatively overrule a series of NYSBA Committee on Professional Ethics Opinions that have prohibited the provision of legal and nonlegal services by a lawyer in the same transaction*[17] *(See N.Y. State 752; 753; 755)*" (emphasis added).

Further emphasizing the significance of the change that the adoption of Proposed Paragraph (c) would have caused, the aforesaid COSAC Commentary to Proposed Rule 5.7,

published on September 30, 2005, stated that: "*¶ [c] is new and has no counterpart in either the current New York Code or the Model Rules"* (emphasis added).[18] Without, however, Proposed Paragraph (c) being included in Rule 5.7 as adopted, there is no substantive difference between the Code and the Rules that would lead to the conclusion that Opinions 752, 753 and 755 have been overruled.

As indicated above, Opinions 752, 753 and 755 were based on DR 5-101(A). As also indicated above, that DR provided that if it could first be established that a disinterested lawyer could believe that an interested lawyer's representation of a client could not be adversely affected by the interested lawyer's own financial or business interests, then, with proper disclosure to and the consent of the client, the interested lawyer could provide both legal and nonlegal services in the same transaction.

This restriction against engaging in matters in which an attorney may have a conflict of interest, and the use of a multi-pronged test to determine whether that restriction may be overcome, is also included within the Rules. Rule 1.7 provides as follows:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that:
>
> …there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interest.
>
> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer *reasonably believes* [emphasis added] that the lawyer will be able to provide competent and diligent representation to each affected client; and… each affected client gives informed consent, confirmed in writing.[19]

Thus, as was the case with respect to DR 5-101(A), under Rule 1.7 an attorney must assess the potential impact on the representation of a client created by the client's lawyer having a financial or other interest in the matter. Only if it can first be reasonably concluded that the impact will not exceed what is proscribed may an attorney, following appropriate disclosure and advice to the client, obtain the client's consent thereto. As stated in Comment [5B] to Rule 5.7, referring to Rule 1.7(b):

> [i]n *certain cases*, it will not be possible to provide both legal and nonlegal services because *the lawyer could not reasonably believe* that he or she can represent the client competently and diligently while providing both legal and nonlegal services in the same or substantially related matter (emphasis added).[20]

In the absence of (1) the adoption of Proposed Paragraph (c), (2) any modification of Opinions 752, 753 and 755, or (3) any other difference between the Rules and the Code that would provide to the contrary, those *certain cases* continue to include providing, in the same transaction, the legal and nonlegal services described in those Opinions. Otherwise, it would now be consentable for an attorney to both act as a real estate broker and represent a purchaser in the same transaction.

As far as the Commentary provided by COSAC in 2005 with respect to Proposed Paragraph (c) is concerned, said Commentary only stated that "*paragraph [c]* and the accompanying Comments are meant to overrule… Opinions 752, 753 and 755" (emphasis added).[21] Without the inclusion of Proposed Paragraph (c) in the final version of Rule 5.7, that portion of the Commentary is not germane.

Moreover, in addition to the absence of any clear statutory basis for concluding that Opinions 752, 753 and 755 have been overruled, inquiries to representatives of the Bar Association, COSAC and the Appellate Division as to whether they believe such to have occurred were all answered in the negative.

Representatives of the Bar Association stated that the Ethics Committee did not consider those Opinions overruled as a result of the adoption of the Rules. They also indicated that though the Ethics Committee has reconsidered some of their prior Opinions in light of the adoption of the Rules, and is considering whether certain other Opinions need to be revised or rescinded, Opinions 752, 753 and 755 are not among them.[22]

A senior representatives of COSAC was specifically asked whether the fact that the aforesaid proposed Comments [5], [6] and [7] to Proposed Rule 5.7, referencing Proposed Paragraph (c), remained in the final Comments to Rule 5.7 as adopted (without such cross-references), reflected a belief on the part of COSAC that Opinions 752, 753 and 755 had been overturned by the Rules. He answered that those Comments were retained to provide guidance with respect to the interplay between Rule 5.7 and Rules 1.7 and 1.8. In no sense, however, was it COSAC's conclusion that, absent the adoption of Proposed Paragraph (c), the aforesaid Opinions no longer applied.

A representative of the Appellate Division involved in the adoption of the Rules stated that the Court did not want to tinker with provisions of the Code that had not been in effect too long and DR 1-106 (which is substantively identical to Rule 5.7 as adopted) had only been adopted on November 1, 2001. Further, the Appellate Division was not prepared to loosen any standard set forth in

the Code dealing with conflicts of interest. Moreover, I was advised that after reading the aforesaid Reporters' Notes with respect to the effect of Proposed Paragraph (c), the decision was made that said paragraph not be included in the final version of Rule 5.7 because the Appellate Division was unwilling to negate Opinions 752, 753 and 755.

Finally, it is also my understanding that in response to a question posed at a recent presentation of the Bar Association's program entitled "Real Problems, Real Answers: One Year's Experience with the New York Rules of Professional Conduct," as to whether Opinions 752, 753 and 755 had been overruled by the adoption of the Rules, a member of the local panel replied that they were not.[23] No one else on the panel contradicted that response.

Based on the foregoing, it is my belief that the Comments to Rule 5.7 do not result in N.Y. State Opinions 752, 753 and 755 being overruled. As described in paragraph [13] of the Scope: "*[t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative*" (emphasis added).[24] There is no substantive difference between the *text* of the Code and the *text* of the Rules governing conflicts of interest that would lead to the conclusion that those Opinions no longer apply. Accordingly, I would strongly recommend that, in the same or similar transactions, New York practitioners do not provide, and do not seek their client's consent to their providing, the legal and nonlegal services which those Opinions held cannot be so combined.

## Endnotes

1. Karl B. Holtzschue, *N.Y. Rules of Professional Conduct Make It Consentable for a Lawyer to Refer a Client to the Lawyer's Title Abstract Company*, N.Y. Real Prop. L.J. vol. 38, no. 2, at p. 15 (Spring 2010).
2. The Rules are published as Part 1200 of The Joint Rules of the Appellate Division (N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (N.Y.C.R.R.)) (WL 2010).
3. *See* NYSBA, *New York Rules of Professional Conduct*, *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&Template=/TaggedPage/TaggedPageDisplaycfm&TPLID=7&ContentID=21454 (last visited Aug. 31, 2010).
4. *See* ABA, *Center for Professional Responsibility*, *available at* http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Aug. 31, 2010).
5. *See* NYSBA, *Resources on Professional Standards for Attorneys in New York State*, *available at* http://www.nysba.org/Content/NavigationMenuForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm (last visited Aug. 31, 2010).
6. Model Rules of Prof'l Conduct R. 5.7 (2010); *see also* N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 R. 5.7 (N.Y.C.R.R.) (WL 2010).
7. This paragraph was designated Rule 5.7(d) in a two-volume report, dated Sept. 30, 2005, issued by COSAC proposing a set of *Rules of Professional Conduct* for adoption in New York (hereinafter COSAC Report), *available at* http://www.nysbar.org (last visited August 31, 2010). After a lengthy period during which the Rules as set forth in that 2005 report were discussed and, in some cases, revised, on Nov. 3, 2007 the Bar Association adopted the proposed *Rules of Professional Conduct*, which were then published in a report prepared by the Bar Association dated Feb. 1, 2008. In that report said paragraph was re-designated Rule 5.7(c) (hereinafter Bar Report), *available at* http://www.nysba.org (last visited August 31, 2010).
8. Bar Report, *supra* note 7.
9. N.Y.S.B.A. Comm. on Prof'l Ethics. Op. No. 752, *available at* http://www.nysba.org (last visited August 31, 2010).
10. *Id.* DR 1-106 was one of a number of new rules on multidisciplinary practice adopted by the Appellate Division, effective Nov. 1, 2001.
11. *Id.*
12. *Id.*
13. *Id.*
14. N.Y.S.B.A. Comm. on Prof'l Ethics. Op. No. 753, *available at* http://www.nysba.org (last visited August 31, 2010).
15. N.Y.S.B.A. Comm. on Prof'l Ethics. Op. No. 755, *available at* http://www.nysba.org (last visited August 31, 2010).
16. Model Rules of Prof'l Conduct R. 5.7 (2010); *see also* 22 N.Y.C.R.R. § 1200 R. 5.7 (WL 2010).
17. Bar Report, *supra* note 7.
18. *Id*.
19. Model Rules of Prof'l Conduct R. 1.7 (2010); *see also* 22 N.Y.C.R.R. § 1200 R. 5.7 (WL 2010).
20. *Id.*
21. Bar Report, *supra* note 7.
22. The persons refernced in this article did not speak to the author for purposes of attribution and therefore are not identified by name.
23. This presentation was held in New York City on June 9, 2010; *see* http://www.nysba.org/AM/Template.cfm?Section=Events1&Template=/Conference/ConferenceDescByRegClass.cfm&ConferenceID=4117.
24. Model Rules of Prof'l Conduct R. 5.7 (Comment at para. 13) (2010); *see also* 22 N.Y.C.R.R. § 1200 R. 5.7 (WL 2010).

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**The author thanks Eon Nichols, an associate with the firm, and Andrew Tran, a summer associate with the firm and a third year student at Brooklyn Law School, for their assistance with this article.**

# Navigating Buyers and Developers of Newly Constructed Buildings Through an Unprecedented Real Estate Crisis

By Adam Leitman Bailey and John M. Desiderio

In late 2008, the real estate sky had started to fall and fall quickly. As a result of the loss of financing and wages, many purchasers in contract to buy a unit in a newly constructed building were either no longer able or willing to close on their units. To make matters worse, the credit markets had been greatly curtailing the flow of money into the hands of developers from purchasers. In March 2008, two of the last outposts of lending, Fannie Mae and Freddie Mac, put the brakes on loans to newly constructed buildings by requiring sales of at least 70 percent of a building's units in order for its buyers to obtain a loan. Although this policy later changed to 50 percent and "sold" became "in contract" for most lenders' purposes, the perfect real estate storm became a hurricane when many developers no longer had the capital to deliver the building as promised in the marketing materials. Engineers found serious problems with many structures including in some cases the failure to build in accordance with fire prevention protocols and materials.

This crisis required that all sides battle Goliath in several different forms, and this time David had neither a sling, nor a stone or a sword. So real estate attorneys struck with our pens. We became creative, bold and brave.

The buyers battled the developers and the developers fought off their lenders. Both sides prayed for governmental assistance of varying kinds: (a) from Congress to open the credit markets, (b) from the Department of Buildings to make sure buildings were built safe, and (c) from the Attorney General's office to enforce the promises made in the offering plans.

Since neither financial hardship nor changed economic circumstances provide legal grounds for rescinding valid contracts, real estate lawyers enmeshed in this unprecedented set of circumstances, which continue to affect the current market, utilized the legal tools available to them—sophisticated laws and technical arguments from a detailed analysis of legal documents and offering plans—to spur negotiations that would lead to closings, wherever possible, despite the crisis.

The most adept developers realized that, even if a discount had to be made to close a deal, a sizable portion of their loan could be paid off with the sale of each unit. The majority of developers came to the negotiating table to make deals, and, in many cases, not because of the merits but due to the real necessity of having to put people into the newly constructed homes. The available legal tools became opportunities for both sides to negotiate. The principal tools for obtaining rescission of a contract or agreements providing discounted prices (while ensuring that a client's largest financial investment was the home he or she was promised) included: (1) The buyers' contract terms; (2) the Martin Act (General Business Law ["GBL"] §§ 352, et seq.) and the regulations promulgated under it by the Attorney General (13 NYCRR §§ 20.1 et seq.); (3) the private common law fraud action; and (4) the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 USC §§ 1701, et seq.

## The Contract Terms

The most obvious tool to reverse a deal is the buyer's contract itself. The typical condo purchase agreement, drafted for the sponsor's benefit, which buyers in almost all cases receive on a "take it or leave it" basis, is designed to bind buyers to the deal and force them to close as early as possible after the issuance of the Temporary Certificate of Occupancy ("TCO"). Typically, buyers find themselves forced to close, under threat of losing their deposit money, when the building and its promised amenities, in their view, are still in a construction mode. Nevertheless, the condo contract does provide the buyer with one very significant right—the right to a pre-closing inspection of the premises—that may enable the buyer to identify a basis for rescinding the deal.

Sponsors uniformly give buyers the right to one "official" walk-through of the premises before the closing date. Contracts normally require that buyers exercise this right no sooner than one week before the scheduled closing. In many cases, the actual walk-through may take place only one or two days before the closing. Buyers faced with such pressure often find their new "dream" home in hardly "move-in" condition. Condo contracts provide that the buyers may compile "punch lists" of items that the sponsor agrees to repair or correct after the closing, but condo offering plans exclude from the sponsor's "repair or correct" obligations almost all cosmetic defects found during the walk-through, and, unless a construction defect is deemed "material" and non-reparable after the closing, the Attorney General will not require a sponsor to refund a buyer's deposit.

Accordingly, buyers are advised to seek access to the building and to their unit through one or more "unofficial" walk-through inspections, well before their closing date, with a consulting engineer (or team of engineers) capable of inspecting the building's common elements, including its roof, elevators, mechanical, electrical, and plumbing and heating systems. All condo contracts expressly provide that, in addition to the individual unit specified in the agreement, the buyer is also purchasing, together with other buyers in that condo, *an undivided interest* in all of the building's common elements.

Demand should always be made that the official walk-through include an inspection of the building's roof and other common elements. The buyers' engineers will be looking to determine whether the building-wide systems are in operational condition or materially defective in any way. They will be looking to see if the spon-

sor's construction exhibits the skillful workmanship required under (a) the Housing Merchant Implied Warranty Law ("HMIW") (GBL §§ 777, et seq.),[1] (b) such limited warranty as the law may otherwise permit the sponsor to provide where the HMIW does not apply, or (c) the common law implied warranty for new home construction.[2] In addition, the engineers will be looking for any apparent violations of the Department of Buildings Code and for any material variations from the building's plans and specifications (to the extent disclosed in the architect's description of the building contained in the offering plan).

While sponsors contend that there is no provision in law or in the contract requiring them to permit such an inspection, there also are no provisions in a typical purchase agreement that necessarily preclude buyers from conducting such an inspection during their "walk through." Indeed, such an inspection is nothing less than the "due diligence" that any buyer is obliged to perform before making a lifetime investment in that new home, and which, for lack of doing so, a buyer may otherwise be held bound to his or her purchase "as is."

Sponsors can be expected also to characterize the demand for such an inspection as a "fishing expedition" intended for no other purpose than to find an "excuse" for not closing. However, persons who buy a new automobile at least get to have a "test drive" before driving the car out of the dealership. Moreover, once the sponsor relinquishes control of the building's Board of Managers, it becomes the responsibility of the residential owner-members of the Board to manage and maintain the building for all unit owners. Given that fact, buyers clearly have a right to inspect the building systems they will be responsible for maintaining in the future.

There currently are no legal precedents that either grant or deny the right of the buyer to conduct a pre-closing inspection of the common element building-wide systems. However, in *Andesco, Inc. v. Page*,[3] where the buyer contended that the seller had improperly denied it access to the premises to secure financing for the transaction, the First Department held that a question of fact existed as to whether access to the premises had been denied and whether the denial was a material breach of the contract. More recently, in *Alligory Business Ltd. v. 86th & 3rd Owner LLC and Related 86th & 3rd Owner LLC*, New York County Supreme Court held (a) that the condo buyers' causes of action for breach of purchase agreement, rescission, and refund of their deposits, *for sponsor's refusal to allow inspection of the common elements*, could proceed, and (b) that *"if plaintiffs prove an entitlement to inspection of the restricted areas, and upon inspection find material noncompliance with the plans and specifications of the building, they may seek to recover damages proved."*[4] (Emphasis added).

## The Martin Act

Although buyers may not sue to rescind their contracts due "solely" to omissions from the offering plan of any required disclosures,[5] buyers may nevertheless seek refunds of their deposits under terms in their contracts and offering plans that are mandated by the Martin Act and the Attorney General's implementing regulations.

Under 13 NYCRR § 20.3, sponsors are required to state in their offering plans (which are incorporated into the purchase agreement) the anticipated commencement date for the first year of condominium operations (*i.e.,* the date of first closing) together with the estimated budget for that first year of operations. If the actual or anticipated date of commencement of condominium operation is delayed more than six months from the commencement date of the projected budget year, the sponsor is required to amend the offering plan to disclose revised budget projections. In such cases, if the amended budget projections exceed the original projections by 25% or more, the sponsor must offer all purchasers the right to rescind and a reasonable time (of not less than 15 days) in which to exercise that right.

In addition, the sponsor is also obliged to offer the buyer the right to rescind if the first closing does not occur within twelve months after the anticipated date stated in the offering plan. For example, if the first year of condominium operations stated in the offering plan was November 1, 2008 through October 31, 2009, but a first closing did not take place within that twelve-month period, the sponsor is obliged (a) to offer all then-current contract vendees the right to rescind, and (b) to amend the offering plan, to include an amended first year of operation and an amended budget projection for that new first year, for all buyers who subsequently sign purchase agreements for that development.

To avoid having to offer the right of rescission for failing to close within the projected first year of operations, some sponsors have appeared to speed up construction to obtain the requisite TCO that enables them to implement the first closing within the twelve-month period projected in their plan. Such speeding-up of construction often results in shoddy finishing that causes great dissatisfaction and cause for complaint even among buyers who do not wish to back out of their contracts.

In such cases, there is often reason to suspect that the "first closing" within the twelve-month period was done with an "insider" friend of the sponsor and is therefore a sham closing. Where such sham first closings can be documented, rescission of all contracts necessarily follows, and the sponsor's subsequent development activities receive special scrutiny and oversight from the Attorney General.

However, unless the connection between the sponsor and the "insider" is undeniable, the sham nature of the "first closing" must be proven through litigation in a private lawsuit or through the Attorney General's dispute resolution process. The rule prohibiting a private cause of action under the Martin Act does not preclude a private cause of action for common law fraud where it is alleged that the sponsor has engaged in a deceptive course of conduct not consisting "solely" in having failed to comply with Martin Act disclosure requirements.[6] Fraudulent conduct will also subject the sponsor to liability under New York's Deceptive Practices Act (GBL Article 22-B, §§ 349-350).[7]

## The Interstate Land Sales Act ("ILSA")

In 2009, buyers' attorneys in New York, for almost the first time in nearly forty years, had reason to seek the protections and remedies provided to their clients by ILSA.

ILSA is a federal consumer protection statute that is intended to protect purchasers of new residential housing that purchasers contract to buy prior to the completion of construction. It applies to all condominiums that are not exempted from the act, and it is a "strict liability" statute that (a) mandates certain registration, disclosure, and contractual requirements, and (b) prohibits fraudulent and misleading sales practices.

Where ILSA applies, sponsors who have violated its provisions are liable to refund all of the moneys received from buyers who revoke their contracts within two years of the contract's execution date, and buyers may sue, within three years of the contract signing, to recover the moneys paid to the sponsor, plus costs and reasonable attorney's fees. ILSA provides buyers' attorneys with a powerful new weapon to use against the sponsor.

The primary ILSA violations that provide buyers with the right to revoke the contract and obtain a full refund of their deposit moneys are: (1) failure to give the buyer, in advance of signing the purchase agreement, a Property Report containing information required by federal HUD regulations, (2) failure to include in the contract a description of the property being purchased that is acceptable for recording in the jurisdiction in which the property is located,[8] and (3) failure to include a provision in the contract clearly stating that, in the event of a buyer's default, after the buyer has paid 15% of the purchase price, the seller is obligated to refund any amount remaining after subtracting (A) 15% of the purchase price, excluding any interest owed under the contract, or the amount of damages incurred by the seller as a result of the breach, whichever is greater, from (B) the total amount paid by the buyer, excluding interest.

ILSA had been virtually unknown to most New York real estate attorneys since its initial enactment in 1968. While there are many reported decisions (in both federal and State courts) in cases brought under the act in other States, there are only a handful of New York cases involving ILSA. There is not yet an authoritative body of New York federal or State case law interpreting ILSA's application to New York real estate transactions. Whether newly constructed New York condominiums are exempt from ILSA is a question that is likely to be much litigated in New York courts over the next few years.[9]

## Conclusion

New York real estate attorneys have used each of the legal tools noted in this article to negotiate substantial price discounts and partial deposit refunds for their buyer clients. Faced with meeting urgent financial obligations to construction lenders, and needing to complete the most sales possible, to avoid possible bankruptcy and loss of their investments, many developers have been willing to negotiate contract price reductions. They have been less willing to provide deposit refunds (except for refunds required in the circumstances specified above under the Martin Act or the partial refunds to defaulting purchasers mandated by ILSA). However, the most financially sound developers have stood fast and forced purchasers to resort to litigation to obtain redress. Many of these litigations remain pending. Whatever their ultimate result, the outcome in these cases is likely to have great impact on the rights of developers and purchasers in the New York real estate market for many years to come.

## Endnotes

1. *See Fumarelli v. Marsam Development, Inc.*, 92 NY2d 298 (1998) (for buildings of five stories or less).
2. *See Caceci v. DiCanio Construction Corp.* 72 NY2d 52 (1988) (for buildings of six or more stories).
3. 137 AD2d 349, 530 NYS2d 111 (1st Dept. 1988).
4. Slip Opinion, at 5. Index No. 601824/2009 (Sherwood, JSC). (Adam Leitman Bailey, P.C. represents the buyers in *Alligory*).
5. *See Kerusa v. W10Z/515 Real Estate Limited Partnership*, 12 NY3d 236 (2009).
6. *See Board of Managers of Woodpoint Plaza Condominium v. Woodpoint Plaza LLC*, Index No. 12579/06 (Supreme Court, King's County, 8/10/09) (Demarest, J.) 24 Misc.3d 1233A, 2009 WL 2432346.
7. *See, e.g., B.S.L. One Owner Corp. v. Key International Manufacturing, Inc.*, 225 AD2d 643, 640 NYS2d 135 (2d Dept. 1996).
8. *See* 15 USC § 1703(d)(1). Given N.Y. Real Property Law § 339-o (requiring all condominium unit conveyances to include "liber, page and date of recording of the declaration"), it is an open question whether any New York condo contract's property description can be deemed a valid legal description acceptable for recording before the filing of the condo declaration.
9. *See, e.g., Bodansky v. Fifth on the Park Condo*, LLC, 2010 WL 334985 (S.D.N.Y. 2010).

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**Editors' note:** In *Bacolitsas et al. v. 86th & 3rd Owner, LLC* (USDS SDNY Index No. 09 CIV 7158, decided 9/21/09), a case decided after the submission date of this article, the Court, Judge Castel, held that the condominium sponsors violated ILSA when the sponsors failed to record the Purchase Agreement. The Agreement was not recordable because it was not acknowledged. The Court ordered the sponsors to return the purchasers' deposit. A prominent New York developer's attorney referred to the Court's holding as a "game changer." (*See* Josh Barbanel, *Buyer's Remorse Gets Lift*, THE WALL STREET JOURNAL, Sept. 23, 2010). The decision could allow hundreds of condo buyers, who have been burned by falling prices, to get their money back. The authors of this article represented the prevailing plaintiffs. The sponsors have indicated they will appeal.

# Accommodations and Modifications in the New York City Housing Court for Litigants with Disabilities

By Kevin M. Cremin and Gerald Lebovits

## I. Introduction

Federal, state, and local statutes, rules, and regulations protect the rights of people with disabilities.[1] Antidiscrimination laws recognize that disabilities result from the interaction of a person's impairment with the barriers the person faces.[2] These barriers can be caused by the "built environment," such as staircases, narrow doorways, and inaccessible bathrooms, or by attitudinal biases, such as misunderstanding, prejudice, and stigma.[3] Disability-rights laws are designed to eliminate the physical and attitudinal barriers that people with disabilities face when they participate in society.[4]

One way disability-rights laws eliminate barriers is by giving people with disabilities the right to reasonable accommodations and modifications of policies, practices, and the built environment.[5] During the twenty years since Congress enacted the Americans with Disabilities Act, requests for reasonable accommodations have become more and more prevalent in various contexts, including public services and housing.[6] Finding and keeping adequate housing is often a struggle for people with disabilities.[7] This is particularly true in a city like New York, where the housing stock overwhelmingly pre-dates the accessible design and construction requirements of the Fair Housing Act Amendments[8] and where the vacancy rate for accessible and affordable housing is low.[9] Given these factors, it is unsurprising when a person with a disability ends up as a litigant in the Housing Part of the New York City Civil Court, commonly called the Housing Court.

When people with disabilities are sued in Housing Court, two questions not generally relevant in landlord-tenant cases arise. The first is whether a reasonable accommodation or modification will affect the outcome of a lawsuit heard in Housing Court.[10] The second is whether Housing Court and its policies and procedures are accessible for litigants with disabilities.[11] To ensure that litigants with disabilities are not being evicted from their homes because of discriminatory barriers, the answers to both these questions are vital.

This article discusses the law governing the accessibility of housing, access to the courts, and attempts by litigants, attorneys, and judges in New York to address barriers to participation by people with disabilities. Although this article will focus on the New York City Housing Court, much of its content applies to eviction proceedings in every state.[12]

Section II of this article provides an introduction to the federal, state, and local laws that govern requests for reasonable accommodations and modifications. The procedure to make requests for reasonable accommodations and modifications is covered in Section III, and the challenges presented by choosing the proper forum to challenge denials of requests for reasonable accommodations and modifications are discussed in Section IV. Section V discusses examples of requests for both substantive and procedural accommodations and modifications made by litigants with disabilities. Calls for accessibility improvements in Housing Court by advocates and lawmakers are detailed in Section VI. This article concludes with Section VII.

## II. Statutes Governing Requests for Reasonable Accommodations and Modifications

Requests for reasonable accommodations and modifications by Housing Court litigants can be governed by the Americans with Disabilities Act (ADA),[13] the Rehabilitation Act,[14] the Fair Housing Act (FHA),[15] the New York State Human Rights Law (NYSHRL),[16] and the New York City Human Rights Law (NYCHRL).[17]

### A. Americans with Disabilities Act

The ADA prohibits discrimination against people with disabilities in three main contexts: employment, public services, and public accommodations.[18] To be eligible for ADA protection, a Housing Court litigant must satisfy the ADA's definition of "disability." Individuals are considered "disabled" for ADA purposes if they (1) have a physical or mental impairment that substantially limits one or more major life activity, (2) have a record of that impairment, or (3) are "regarded as" having that impairment.[19] These three prongs have been the subject of much litigation, and, historically, the United States Supreme Court has interpreted the ADA's definition of disability narrowly.[20] The Supreme Court has held, for example, that the inquiry should consider whether medication and implements like eyeglasses and hearing aids ameliorate the individual's impairment.[21]

In 2009, however, Congress unanimously passed the ADA Amendments Act to overrule the Supreme Court's narrow interpretation of the definition of disability.[22] The ADA Amendments Act clarifies that the inquiry should not take into account the "ameliorative effects of mitigating measures,"[23] and it incorporates a non-exclusive list of examples of major life activities relevant to determine whether an individual is disabled.[24] The ADA Amendments Act also lowers the burden facing litigants

who plead that they are "regarded as" disabled.[25] More generally, the Act provides that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis" and that, instead, "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.…"[26]

The ADA has three major titles. Title I covers employers of fifteen or more people.[27] Title II covers public services.[28] Title III covers public accommodations and commercial facilities.[29] For Housing Court litigants, Titles II and III are the most relevant.

Title II covers public entities, which include state and local governments as well as any "department, agency, special purpose district, or other instrumentality of a State or States or local government."[30] Title II covers Housing Court and its administration. The Supreme Court has held that Title II enforces "the right of access to the courts."[31] In reaching that decision, the Supreme Court noted that the ADA's legislative history chronicles a long pattern of discrimination against people with disabilities by public entities, including the courts.[32] Title II also covers housing funded or operated by New York State, New York City, or public-housing authorities.[33]

Title III is potentially relevant for individuals who live in private residential units. It covers those portions of private housing complexes—such as rental offices and parking, sidewalks, and restrooms appurtenant to the use of those rental offices—that are open to the general public as public accommodations or commercial facilities.[34] Title III does not apply to a private residential unit's interior.[35]

Entities the ADA covers, such as Housing Court and public housing, are required to provide reasonable modifications for people with disabilities.[36] Their failure to do so constitutes discrimination.[37] A covered entity is not obligated to provide a reasonable modification if the person requesting the modification is not disabled,[38] the requested modification is not "reasonable,"[39] or the requested modification is not "necessary."[40] The covered entity can also prove that the requested modification would constitute an undue burden or a fundamental alteration[41] or that the person requesting the modification poses a direct threat to the covered entity's other users.[42]

The undue burden, fundamental alteration, and direct-threat defenses are limited in scope. To prove that a modification would constitute an undue burden or a fundamental alteration, a public entity must show that the determination was made by "the head of the public entity or his or her designee," was "accompanied by a written statement of the reasons for reaching that conclusion," and was "based on all resources available for use in the program."[43] The covered entity's resources are relevant to the inquiry because the entity generally bears the burden of paying for the reasonable modification.[44] If the requested modification would result in a fundamental alteration, "the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity."[45] To invoke the direct-threat defense successfully, the covered entity must prove that the person in question poses a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[46] Failing to grant a request for a reasonable modification can be costly. A person with a disability whose request for a reasonable modification is wrongly denied by a public entity is potentially entitled to injunctive relief, compensatory damages, and attorney fees.[47]

### B. Rehabilitation Act

The Rehabilitation Act prohibits discrimination against people with disabilities by "any program or activity receiving Federal financial assistance" and "any program or activity conducted by any [Federal] Executive agency or by the United States Postal Service."[48] To the extent that the New York State Unified Court System (UCS) and the New York City Housing Authority receive federal funding, the Rehabilitation Act applies to Housing Court and public housing.[49] With regard to requests for reasonable accommodations or modifications, the requirements, defenses, and relief available under the Rehabilitation Act are essentially the same as those under ADA Title II.[50]

The Rehabilitation Act also applies to privately owned housing that receives federal financial assistance through the HOME Investment Partnerships Program, the Community Development Block Grant Program, or other housing-subsidy programs funded by the Department of Housing and Urban Development.[51] The Rehabilitation Act requires federally assisted housing providers to "provid[e] and pay[] for reasonable accommodations that involve structural modifications to units or public and common areas."[52] This is a significant difference between the Rehabilitation Act and the FHA because, as discussed in the following subsection, the cost of structural modifications under the FHA is generally borne by the individual who requests the modification.

### C. Fair Housing Act

The FHA was amended in 1988 to prohibit discrimination on the basis of "handicap."[53] The FHA defines the term "handicap" in essentially the same way the ADA defined the term "disability" before the ADA Amendments Act.[54] Unlike the ADA, the FHA focuses on preventing discrimination in buying or renting "dwellings."

Under the FHA, a "dwelling" is "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction

or location thereon of any such building, structure, or portion thereof."[55] Although there are some exemptions from coverage,[56] the FHA covers most properties involved in New York City Housing Court disputes.

The FHA defines discrimination to include refusing to permit both reasonable modifications and reasonable accommodations.[57] The FHA requires individuals and entities owning, managing, selling, or renting covered dwellings "to permit, *at the expense of the handicapped person*, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises…."[58] Under the FHA, the term "reasonable modification" refers only to a change to a physical or structural element of a covered dwelling or common area. According to the Department of Justice and the Department of Housing and Urban Development, "[e]xamples of modifications that typically are reasonable include widening doorways to make rooms more accessible for persons in wheelchairs; installing grab bars in bathrooms; lowering kitchen cabinets to a height suitable for persons in wheelchairs; adding a ramp to make a primary entrance accessible for persons in wheelchairs; or altering a walkway to provide access to a public or common use area."[59]

Requests to change rules, policies, practices, or services are called requests for reasonable accommodations.[60] Under the FHA a refusal "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling" constitutes discrimination.[61] The landlord is generally responsible for paying the costs associated with a reasonable accommodation.[62]

The defenses to claims alleging the wrongful denial of a request for a reasonable accommodation or modification are similar to the ADA's defenses.[63] A landlord is not obligated to provide a reasonable accommodation or modification if the person making the request is not disabled, the requested change is not "reasonable," or the requested modification is not "necessary."[64] The landlord can also prove that the requested accommodation or modification would constitute an undue burden or a fundamental alteration[65] or that the person requesting the modification poses a direct threat to other users of the covered entity.[66] Additionally, a landlord may condition its grant of a request for a reasonable modification "on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted."[67] A person whose request for a reasonable accommodation or a reasonable modification is wrongly denied is potentially entitled under the FHA to injunctive relief,[68] compensatory damages,[69] punitive damages,[70] and attorney fees.[71]

The FHA "does not preempt State or local law from dealing with the issue of reasonable accommodations for handicapped or disabled persons in their residence."[72] The next two subsections will therefore discuss the relevant aspects of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) .

### D. New York State Human Rights Law

The NYSHRL prohibits discrimination against a wide range of protected classes, including people with disabilities.[73] Under the NYSHRL, like the ADA, the Rehabilitation Act, and the FHA, people are disabled if they meet the statutory criteria for disability, have a record of having an impairment, or are regarded as having an impairment.[74] The NYSHRL defines "disability" more broadly than do the federal laws discussed earlier in this section. In particular, the NYSHRL provides that "[t]he term 'disability' means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques…."[75] The NYSHRL does not contemplate inquiring into whether the impairment substantially limits a major life activity.[76]

The NYSHRL prohibits discrimination in selling, renting, or leasing a housing accommodation.[77] The term "housing accommodation" "includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings."[78] Limited exceptions apply to renting owner-occupied single-family or two-family houses.[79] The scope of housing the NYSHRL covers is slightly broader than what the FHA covers. For example, although the FHA's definition of "dwelling" is limited to "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence,"[80] the NYSHRL expands coverage to include buildings and structures occupied or intended to be occupied "as [a] home, residence or sleeping place."[81]

Entities the NYSHRL covers, such as private and public housing, are required to provide reasonable accommodations and modifications for people with disabilities. The NYSHRL defines the term "reasonable accommodation" in a manner specific to the realm of employment,[82] but it also requires providers of private or public housing "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling."[83] Like the FHA, the NYSHRL requires private or public-housing providers to "permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to

afford the said person full enjoyment of the premises."[84] The defenses to claims alleging a wrongful denial of a request for a reasonable accommodation or modification are essentially the same as those available under the FHA.[85]

Under the NYSHRL, a person whose request for a reasonable accommodation or a reasonable modification is wrongly denied is potentially entitled to injunctive relief,[86] compensatory damages,[87] punitive damages,[88] and attorney fees.[89]

### E. New York City Human Rights Law

Like the NYSHRL, the NYCHRL prohibits discrimination against a wide range of protected classes, including people with disabilities.[90] People are disabled under the NYCHRL if they have "any physical, medical, mental or psychological impairment, or a history or record of such impairment."[91] Because the definition focuses on the existence of an impairment alone, the NYCHRL is even broader than the NYSHRL.[92]

Like the NYSHRL, the NYCHRL prohibits discrimination in selling, renting, or leasing a housing accommodation.[93] The NYCHRL defines "housing accommodation" the same way the NYSHRL does,[94] and the NYCHRL also applies to public housing.[95]

The NYCHRL requires providers of private and public housing to provide "reasonable accommodations" for people with disabilities.[96] Under the NYCHRL, a "reasonable accommodation" is an "accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business."[97] It therefore encompasses both changes to policies and procedures as well as the structural changes to existing premises that are called "reasonable modifications" in the FHA and NYSHRL. The NYCHRL is less clear than the FHA or the NYSHRL about who should pay for these structural changes and, if necessary, restore the premises to their original condition.[98] Covered entities have, however, been held under the NYCHRL to be responsible to pay for structural changes.[99] The statute specifies that the covered entity bears the burden of proving the undue hardship defense and sets forth factors to evaluate the defense.[100]

Under the NYSHRL, a person whose request for a reasonable accommodation is wrongly denied is potentially entitled to injunctive relief,[101] compensatory damages,[102] punitive damages,[103] and attorney fees.[104]

## III. The Process of Seeking a Reasonable Accommodation or Modification

People with disabilities may themselves request a reasonable accommodation or modification or have a family member, advocate, or attorney ask for one on their behalf.[105] If a person with a disability is already a party in a Housing Court proceeding and has a guardian ad litem (GAL), the GAL may also make the request on a person's behalf.[106]

A request for a reasonable accommodation or modification may be oral or written, but "it is usually helpful for both the [person making the request] and the [covered entity] if the request is made in writing."[107] Successful requests include a statement that (1) the person who is making the request (or on whose behalf the request is being made) is disabled; (2) the law or laws under which the request is made; (3) the specific nature of the change the person requests; and (4) a deadline to respond to the request.[108] A covered entity "has an obligation to provide prompt responses to reasonable accommodation requests," and "[a]n undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation."[109]

When making the request, individuals with disabilities are not required to provide evidence of their disability.[110] If the disability is not obvious or otherwise known to the covered entity, the covered entity that receives the request may inquire about the nature and extent of the person's disability before deciding whether to grant the request.[111]

A request for a reasonable accommodation or modification may be made whenever the person determines that a reasonable accommodation or modification is necessary.[112] Individuals with disabilities may request a reasonable accommodation or modification when they apply for or attempt to purchase housing or while they reside in the relevant housing.[113] A request may be made before, during, or after the person with a disability becomes a party to a Housing Court proceeding or any other lawsuit.[114]

With regard to the accessibility of Housing Court itself, a person with a disability who is a potential employee, employee, observer, juror, attorney, witness, potential party to a lawsuit, or party to a lawsuit may request that the Housing Court make a reasonable accommodation or modification.[115] The UCS has instituted procedures to request reasonable accommodations. Requests can be made to the relevant courthouse's "ADA liaison" in writing, in person, or by telephone.[116] The UCS suggests that "whenever possible," requests be made "well in advance of the court appearance" and include "the type of accommodation needed" as well as "relevant information regarding the court appearance (i.e., court facility address, name of the case, name of the judge, part number, date of the appearance(s), and estimated length of the proceeding)."[117] The ADA liaison will notify the person with a disability whether the requested accommodation can be granted, whether the court proposes an alternative accommodation, or whether additional information is necessary.[118] If the court denies the request for a reasonable accommodation, it will give the person who made the request a written explanation.[119] The decision to deny a request for a reasonable accommodation handled by an ADA

liaison will be made by the chief clerk of the court.[120]

If a litigant chooses to make a request for a reasonable accommodation directly to a judge, the judge will decide whether the request should be granted.[121] The judge may approve requests for reasonable accommodations involving teleconferencing, for example.[122]

## IV. Where to File a Claim Based on a Denial of a Request for a Reasonable Accommodation or Modification

If the request for a reasonable accommodation or modification is denied, the person with a disability may file an administrative complaint or a lawsuit based on that denial. Depending on the law under which the request was made, a person with a disability may file a claim with an administrative agency, in state court, or in federal court. A person with a disability who is already litigating in Housing Court may also assert a defense, affirmative defense, or counterclaim, or all three, in the Housing Court proceeding based on the allegedly improper denial of a request for a reasonable accommodation or modification.

### A. Administrative Agencies

Depending on the relevant law, a person with a disability whose request for a reasonable accommodation has been denied may file a claim with the Department of Justice (DOJ), the Department of Housing and Urban Development (HUD), the New York State Division of Human Rights, or the New York City Commission on Human Rights. Under all the laws discussed in Section II, the administrative process is optional, and there is no exhaustion requirement. The administrative process is easier, less expensive, and quicker than filing or defending a lawsuit. The downside is that damages awards tend to be smaller for successful administrative complaints than those a court might award. A person who elects to file an administrative claim under the NYSHRL or NYCHRL may not file a claim in a court of record.[123] The FHA, however, allows a complainant to pursue administrative and civil court claims until a hearing or trial commences.[124]

If a person with a disability requested a reasonable accommodation or modification under Title II of the ADA or the Rehabilitation Act and the request has been denied, that person may file a complaint with the DOJ.[125] A complaint must be filed within 180 days from the date the alleged discrimination occurred.[126]

If the claim is based on an FHA violation, the complaint must be filed with HUD within one year after the denial.[127] The FHA allows HUD to certify state or local public agencies to enforce the FHA if the substantive rights protected by the agency, the procedures followed by the agency, the remedies available, and the availability of judicial review are all substantially equivalent to those in the FHA.[128] HUD has certified the New York State Division of Human Rights to receive and handle complaints about potential FHA violations.[129]

If the reasonable accommodation or modification claim is based on an alleged NYSHRL violation, the person with a disability may file a complaint with the New York State Division of Human Rights.[130] The complaint must be filed within one year after the alleged unlawful discriminatory practice occurred.[131] Similarly, if the claim is based on an alleged NYCHRL violation, the complaint must be filed with the New York City Commission on Human Rights within one year after the alleged discrimination.[132]

If a summary eviction proceeding is filed against a person with a disability who has a pending administrative complaint, Housing Court has the discretion to stay the summary eviction proceeding under Civil Practice Law and Rules (C.P.L.R.) 2201 and New York City Civil Court Act § 212.[133] Housing Court judges have stayed summary proceedings "where an administrative agency has particular expertise in considering an issue, and ultimate disposition of the summary proceeding may necessarily hinge upon the agency's findings."[134] This is true whether the disability discrimination complaint is being considered by HUD,[135] the New York State Division of Human Rights,[136] or the New York City Commission on Human Rights.[137] Housing Court judges typically require the respondent to pay use and occupancy during the stay.[138]

### B. Housing Court

Individuals may not file a Housing Court claim based on the denial of a request for a reasonable accommodation or modification unless a summary proceeding is already pending against them. A person with a disability against whom a summary proceeding has been filed may assert any applicable claims, defenses, affirmative defenses, or counterclaims based on the ADA, the Rehabilitation Act, the FHA, the NYSHRL, or the NYCHRL.[139]

Housing Court "has jurisdiction to entertain any legal or equitable defense or counterclaim, and can thus entertain a defense or counterclaim based on housing discrimination."[140] Based on the Supremacy Clause, this is true even of claims based on federal civil-rights statutes.[141] Housing Court, however, often severs these claims unless they are intertwined with the eviction proceeding.[142] A counterclaim that seeks damages will be denied if it is "found to be outside the scope of the [summary] proceeding."[143]

Whether a person decides to assert such a claim in Housing Court as opposed to in state or federal court or with an administrative agency will involve a number of considerations. For example, Housing Court and other state-court judges might be less familiar with claims based on federal civil-rights laws than federal court judges.[144] A Housing Court litigant should also consider whether Housing Court has the authority to grant the scope of injunctive relief and the amount of damages the litigant

is seeking.[145] That disclosure is not available as of right in Housing Court might also be a relevant consideration.[146] A Housing Court litigant should also be aware that asserting a defense, affirmative defense, or counterclaim based on disability might lead the petitioner to move for disclosure to seek information regarding the nature and extent of the litigant's disability.[147]

### C. State Court

A claim based on the denial of a request for a reasonable accommodation or modification may also be filed in a state court other than Housing Court. This is true of claims made under the laws discussed in Section II of this article. Neither Title II of the ADA nor the Rehabilitation Act specifies a statute of limitations for private actions. A court will therefore look to state law and apply the statute of limitations for the most analogous state-law claim.[148] In New York, federal courts have held that the three-year statute of limitations for personal-injury claims applies to both Title II of the ADA and the Rehabilitation Act.[149] The FHA allows an aggrieved person to commence a civil action in an appropriate federal or state court within two years after the alleged discriminatory housing practice.[150] The NYSHRL and the NYCHRL both allow people to assert claims in state court[151] within three years after the alleged discriminatory practice.[152] The longer statute-of-limitations period is one important way in which the NYSHRL and NYCHRL differ from the FHA. Individuals with disabilities who are already litigating in Housing Court when they file a claim in a different state court may request a stay of the summary eviction proceedings.[153]

### D. Federal Court

A reasonable accommodation or modification claim may be filed in federal court if the claim is based on the ADA, the Rehabilitation Act, or the FHA.[154] A person with a disability who has an independent federal claim or who is suing an individual or entity located in a different state may also assert NYSHRL or NYCHRL claims. If the person with a disability is already a Housing Court litigant, the scope of relief a federal court can grant might be limited based on the federal court's jurisdiction, the Anti-Injunction Act, the *Rooker-Feldman* doctrine, res judicata, and collateral estoppel.

Although Housing Court litigants may file a claim in federal court based on the denial of a request for a reasonable accommodation or modification, they would likely be unsuccessful if they attempt to remove a summary eviction proceeding to federal court.[155] A number of federal district courts in New York have held that "federal courts do not have federal question subject matter jurisdiction over state residential landlord-tenant matters."[156]

If a tenant with a disability who is facing a summary eviction proceeding files a claim in federal court, the tenant may ask the Housing Court to stay the eviction proceeding under C.P.L.R. 2201 and 3211(a)(4).[157] The tenant may also ask the federal court to stay the summary eviction proceeding, but the Anti-Injunction Act provides a considerable obstacle: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[158] The ADA, Section 504 of the Rehabilitation Act, and the FHA do not contain an express authorization to stay state actions, and they are all enforceable in both state and federal courts.[159] Although a federal court might not stay the Housing Court proceeding, it might enjoin the landlord from proceeding with the eviction.[160]

The Anti-Injunction Act does not apply if a state-court proceeding has not been initiated.[161] If a summary proceeding has not yet been commenced against a tenant with a disability who has a potential reasonable-accommodation claim, the tenant may ask a federal court to enjoin the landlord from initiating an eviction proceeding.[162] This is so even if the tenant with a disability has received a rent demand, termination notice, or other preliminary, or predicate notice but the eviction proceeding has not yet been filed.[163]

Federal courts other than the United States Supreme Court do not have the jurisdiction to review summary-eviction proceedings.[164] The *Rooker-Feldman* doctrine stands for the proposition that "federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments."[165] The Second Circuit has explained that the *Rooker-Feldman* doctrine applies when (1) the federal court plaintiff lost in state court; (2) the plaintiff complains of injuries caused by a state-court judgment; (3) the plaintiff asks the federal district court to review and reject the state-court judgment; and (4) the state-court judgment was rendered before the federal district court action was commenced.[166] Depending on the circumstances of the case and the plaintiff's claims, federal district courts in New York have accepted or rejected the *Rooker-Feldman* doctrine when it has been asserted as a jurisdictional defense in FHA actions.[167] One federal district court in New York has held that the *Rooker-Feldman* doctrine does not apply to interlocutory state-court decisions in summary-eviction proceedings that do not result in a judgment of possession.[168]

Res judicata and collateral estoppel might also bar federal actions by Housing Court litigants. For cases in which the Housing Court has entered a final judgment on the merits, the doctrine of res judicata precludes a Housing Court litigant "from re-litigating issues that were or could have been raised in that action."[169] On the other hand, "[c]ollateral estoppel, or issue preclusion, prevents parties or their privies from re-litigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding."[170] Given the expedited nature and streamlined procedures of summary proceedings, questions have been raised about

whether it is fair to apply res judicata or collateral estoppel when tenants facing eviction fail to raise viable discrimination claims.[171]

## V. Examples of Requests for Reasonable Accommodations and Modifications

A wide array of potential reasonable accommodations and modifications might be necessary to ensure that litigants with disabilities are not being evicted because of discriminatory barriers in their homes or in the courthouse. Below are examples of substantive and procedural accommodations and modifications.

### A. Substantive Accommodations and Modifications

Possibly the most common reasonable accommodation request involves guide dogs,[172] hearing dogs,[173] or service dogs.[174] A litigant generally raises this defense or counterclaim in the context of a summary-eviction proceeding for a purported violation of a "no pet" clause in a lease. These claims will likely be successful if the tenants can prove that they are disabled, that they are otherwise qualified to be tenants, that because of their disability it is necessary for them to keep an animal to use and enjoy the apartment, that an accommodation is reasonable, and that the landlord refused to make the requested accommodation.[175] Claims are often denied if expert testimony or medical documentation does not support the claimed necessity.[176]

Other requests for reasonable accommodations or modifications often focus on the accessibility a building's entrance. People with disabilities may request reasonable accommodations to gain or maintain access to an accessible entrance,[177] an accessible parking space,[178] or an elevator that already exists,[179] or they can request a reasonable modification to create an accessible entrance by adding a ramp, automatic door openers, or other architectural features.[180] Similarly, tenants with psychiatric disabilities may request a reasonable accommodation to use a secondary entrance to avoid unnecessary anxiety or potential confrontations.[181]

People with disabilities may also request reasonable modifications regarding features of their housing unit, such as grab bars, freezers, washing machines, or air conditioners, or reasonable accommodations about the rules or policies that affect the housing unit's features.[182] Project Open House, administered by the Mayor's Office for People with Disabilities, "removes architectural barriers in the homes of people with permanent mobility impairments."[183] If modifications to the housing unit will not suffice, a person with a disability may request a reasonable accommodation to allow that person to be transferred to a more accessible unit.[184]

Those with disabilities may also request a reasonable accommodation to any rule or policy that might bar them from having a roommate or a full-time health aide if the roommate's or aide's assistance is necessary for the person with a disability to use and enjoy the housing unit.[185] If the roommate is necessary only for financial reasons, the request for a reasonable accommodation will likely be unsuccessful.[186] The Second Circuit has rejected the notion that the FHA requires housing providers to grant economic accommodations to people with disabilities.[187] Often, requests for economic accommodations involve Section 8 vouchers or other public benefits.[188] Because the NYCHRL was recently amended to prohibit discrimination based on "lawful source of income," which includes "income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers,"[189] requests for economic accommodations are now likely to become less necessary for people with disabilities in New York City.

If a tenant, a member of the tenant's family, or the tenant's guest engages in a continuous course of conduct that threatens the health, safety, or comfort of neighboring tenants or other building occupants, the landlord might bring a nuisance proceeding against the tenant.[190] Perhaps the most common type of nuisance proceeding is based on allegations of excessive clutter or hoarding.[191] Because "hoarding is listed in DSM-IV as a symptom of obsessive-compulsive personality disorder,"[192] the connection between these allegations and a tenant's disability may be strong.

Unlike a violation of a substantial obligation of a tenancy, which can be cured, a nuisance generally can be cured only if the nuisance conditions did not exist for a long time, were abated if the tenant was given an opportunity to do so, or are likely to be abated.[193] If the alleged behavior results from a disability, tenants can request a reasonable accommodation.[194] Tenants could potentially request that the alleged nuisance be excused or that they be given assistance, the opportunity to cure it, or both.[195] Some courts have taken into account a tenant's disability in staying an eviction under C.P.L.R. 2201 to allow a post-judgment cure period.[196] To the extent that the tenant requests a modification of the Housing Court's general procedures, a request for a stay under Rule 2201 is akin to the types of procedural accommodations discussed in the next subsection.

### B. Examples of Procedural Accommodations

Litigants with disabilities sometimes ask for reasonable accommodations regarding the procedures generally followed in Housing Court.[197] These requests are sometimes made with regard to testifying, which is considered to be among the most stressful aspects of a lawsuit for any litigant.[198]

During one trial, a judge granted a tenant's request to have a psychiatrist "stand near the witness box to lend emotional support" because the tenant had a "panic disorder."[199] As noted in Section III, judges in New York have also, on a case-by-case basis, approved telephone conferencing "as a way to accommodate people

[with disabilities] who cannot leave their homes or who will have difficulty accessing the court building."[200]

Accommodations have also been made with respect to aspects of pretrial disclosure. One tenant was allowed to have her therapist present during a deposition "to provide her with support."[201] Litigants have successfully requested that, based on their disabilities, they be allowed to produce documents and answers to interrogatories rather than submit to an examination before trial.[202]

A number of pro se complaints have been filed in federal court against the New York City Housing Court and Housing Court judges.[203] Although these claims have been dismissed, they reflect frustration with Housing Court procedures and the perception that Housing Court is not amenable to disability-discrimination claims. Some advocates and lawmakers have suggested potential reforms or reasonable accommodations that aim to make Housing Court policies and procedures more accessible for litigants with disabilities. These reforms are addressed in the following section.

## VI. Calls for Reform by Advocates and Lawmakers

Efforts to improve the accessibility of courts have focused primarily on removing barriers for people with physical disabilities. The United States Access Board, "an independent Federal agency devoted to accessibility for people with disabilities,"[204] formed a Courthouse Access Advisory Committee to promote accessibility in the design of courthouses. Although the Committee's final report is titled "Justice for All," it focuses almost exclusively on providing access for people with physical disabilities.[205]

The New York County Lawyers' Association (NYCLA) has established a Justice Center "charged with a fundamental mission: combine the resources and talents of the legal profession with non-lawyer community leaders and groups to promote access to justice and foster a positive public perception of the administration of justice in New York."[206] NYCLA convened a conference, The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?, "in furtherance of that mission."[207] In one of the articles prepared for this conference, *Protecting the Rights of Litigants with Diminished Capacity in New York City Housing Courts*,[208] Jeanette Zelhof and her co-authors suggest a series of reforms that could be implemented by the Housing Court administration to improve the accessibility of Housing Court for people with cognitive or psychiatric disabilities.

First, they suggest that litigants with diminished capacity be identified early in the process.[209] To meet this goal, they recommend training Housing Court personnel, including judges; cross-referencing court records with those of the New York City Adult Protective Services; requiring landlords and their attorneys to disclose any information they have about a tenant's disabilities; and providing adequate notice to litigants of their right to request a reasonable accommodation.[210] During the NYCLA conference, one working group declined to endorse a new pleading requirement for landlords and their attorneys,[211] but another working group recommended proposing and supporting "legislation requiring language in the Notice of Petition in a nonpayment or holdover proceeding to alert respondents of their statutory right to request from the Housing Court reasonable accommodation or assistance to address any physical and/or mental impairments."[212]

Second, Zelhof et al. suggest that a variety of accommodations be made available to litigants with disabilities. These reasonable accommodations would include "[p]rominent signage throughout the Housing Court informing litigants of their rights to request an accommodation"; "[a] quiet waiting room"; "[a]n afternoon calendar"; "[c]alling the case of a litigant identified as having diminished capacity first"; "[t]elephone or video appearances and testimony [or] in-home hearings"; "[s]pecial clerks trained to assist litigants with diminished capacity to formulate accommodations and to assist in accessing social and legal services"; and "[o]n-site support services."[213]

Third, they suggest that counsel be provided for all Housing Court litigants with disabilities.[214] In support of this proposal, Zelhof et al. argue that "[g]overnment-funded counsel for litigants with disabilities who cannot afford an attorney should be a right under the ADA."[215] There was a consensus among Working Group III of the NYCLA conference that the law supports a general right to counsel for litigants in Housing Court.[216] Working Group IV recommended the establishment of "a right to counsel in Housing Court for parties unable to afford counsel as a means to reduce homelessness in New York City and particularly to protect the elderly and mentally impaired."[217] In making this recommendation, they emphasized the belief that "representation by counsel can help to reduce costs otherwise incurred by society when pro se litigants and litigants of diminished capacity become homeless."[218] NYCLA's Board of Directors later "adopted a resolution endorsed by the Justice Center advocating for a right to counsel for residential tenants in Housing Court who are financially incapable of retaining counsel."[219]

A right-to-counsel program already exists for elderly litigants in Housing Court. The New York City Department for the Aging's Assigned Counsel Project "provides legal representation and social work assistance to senior citizens [in Manhattan, Brooklyn, and Queens] at risk of eviction."[220] In 2006, the Assigned Counsel Project, which began in Manhattan and Brooklyn, "assigned lawyers and social workers to more than 200 clients from 60-90 years of age, double the caseload anticipated."[221] The Assigned Counsel Project has been "recognized by the National Association of Area Agencies on Aging for its achievement."[222]

## VII. Conclusion

True access to justice requires that physical and attitudinal barriers be eliminated both inside and outside our courthouses. To ensure that individuals with disabilities receive a fair hearing in Housing Court, litigants, attorneys, and court personnel must be aware of the reasonable accommodations and modifications to which they are entitled under federal, state, and local law. We must strive to make sure that the Housing Court's policies and procedures, as well as its physical structure, are accessible for all litigants, including those with disabilities. We must also give litigants with disabilities the opportunity to raise the argument, where appropriate, that a reasonable accommodation or modification would affect the outcome of their Housing Court proceeding. In this way, Housing Court can guarantee that litigants with disabilities are not being evicted from their homes because of their impairments or because of the discriminatory barriers they face.

## Endnotes

1. The United States recently became a signatory to the United Nations Convention on the Rights of Persons with Disabilities (CRPD). *See* UNITED NATIONS ENABLE: CONVENTION AND OPTIONAL PROTOCOL SIGNATURES AND RATIFICATIONS (last updated July 19, 2010), http://www.un.org/disabilities/countries.asp?id=166 (last visited Sept. 4, 2010) (noting that the United States became a signatory to the CRPD on July 30, 2009). A number of the CRPD's provisions are relevant to the topics this article covers. *See, e.g.*, Convention on the Rights of Persons with Disabilities and Optional Protocol, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007), *available at* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf (last visited Sept. 4, 2010) [hereinafter *Convention*] (defining "reasonable accommodation" as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"). Because the United States Senate has not yet ratified the CRPD, this article will not address the CRPD and the similarities and differences its provisions have with federal, state, and local laws. It is possible, however, that litigants could still use the CRPD as persuasive authority to seek reasonable accommodations or modifications. *Cf.* Roper v. Simmons, 543 U.S. 551, 576–78 (2005) (citing the United Nations Convention on the Rights of the Child, which the United States has not ratified, as "respected and significant confirmation" of the Court's holding that the execution of individuals who were under the age of eighteen when they committed the relevant crime violates the Constitution).
2. This reflects the "social model" of disability. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–65 (1999) (discussing the medical model, the social model, and the minority-group model of disability).
3. *Id*. at 654–56.
4. *See*, *e.g.*, Convention, *supra* note 1, at 4 (stating the purpose of the Convention is to "protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity").
5. *Id*.
6. *See*, *e.g.*, JOINT STATEMENT OF THE DEP'T OF HOUS. AND URBAN DEV. AND THE DEP'T OF JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUS. ACT (2004), *available at* http://www.hud.gov/offices/fheo/library/huddojstatement.pdf (last visited Sept. 4, 2010) [hereinafter *Joint Statement*] (stating that the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice (DOJ) both "frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities").
7. *See, e.g.*, THE URBAN INST., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP (2005), *available at* www.huduser.org/Publications/pdf/DDS_Barriers.pdf (last visited Sept. 4, 2010) (finding, based on a 2004 experiment, that over one-third of rental properties in Chicago were not accessible for wheelchair users, and that the level of discrimination faced by people with disabilities was extremely high, "substantially *greater than* the levels of housing discrimination experienced by African Americans and Hispanics").
8. There is also evidence that housing units built after the Fair Housing Act Amendments do not comply with its dictates. *See* Charles Bagli, *U.S. Says Many Apartments Violate Law on Disabled*, N.Y. TIMES, Aug. 18, 2008, at B1, *available at* http://www.nytimes.com/2008/08/19/nyregion/19disabled.html (last visited Sept. 4, 2010) (stating that a 2006 survey by the Fair Housing Justice Center (FHJC) of "14 recently built apartment buildings in Manhattan" found that "'none were in compliance with the Federal Housing Act'") (quoting Diane Houk, Executive Director of the FHJC).
9. N.Y. CITY RENT GUIDELINES BD., 2010 HOUS. SUPPLY REPORT (2010), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/10HSR.pdf (last visited Sept. 4, 2010) ("The [2008 Housing and Vacancy Survey] indicated that New York City's housing market remains tight, finding a citywide vacancy rate of 2.91% in 2008…."). *See also* Symposium, *The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 601, 621–623 (2006) (stating that the New York City housing market has "virtually no affordable options in the private sector and a dwindling stock of publicly subsidized housing with enormous waiting lists").
10. Dadian v. Vill. of Wilmette, 269 F.3d 831, 838 (7th Cir. 2001) ("Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff.").
11. Press Release, Legal Services NYC, Legal Services NYC Files Suit Seeking Equal Access to Courts for New Yorkers with Disabilities (Jul. 27, 2010) http://www.cidny.org/content/cidnyweb/Files/CIDNY_Views/LS-NYC_Friedman_Press_Release_072710.pdf (last visited Sept. 4, 2010) (describing a lawsuit filed on behalf of Julian Friedman, who is physically incapacitated and facing eviction proceedings and was required to appear in court risking physical collapse, or accept classification as mentally incompetent though he is not).
12. *See* Sarah Keith-Bolden, *Down and Out and Now Kicked Out: Residential Lease Evictions and the Automatic Stay*, 23 EMORY BANKR. DEV. J. 585, 587 (2007) ("The summary eviction process is relatively uniform in every state."); Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000) ("A summary proceeding for eviction exists in every state.").
13. *See generally* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (Consol. LEXIS 2010).
14. *See generally* Rehabilitation Act of 1973, 29 U.S.C. § 794 (Consol. LEXIS 2010).
15. *See generally* Fair Housing Act, 42 U.S.C. §§ 3601–31 (Consol. LEXIS 2010).
16. *See generally* N.Y. EXEC. LAW § 291 (Consol. LEXIS 2010).

17. *See generally* NEW YORK, N.Y., ADMIN. CODE tit. 8, ch. 1, § 8-107 (Consol. LEXIS 2010).

18. *See* 42 U.S.C. § 12101 (Consol. LEXIS 2010) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.").

19. *See id.* § 12102(1) (defining the term "disability").

20. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196–98 (2002) (holding that the terms "substantially limit" and "major life activity" need to be interpreted strictly).

21. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures…must be taken into account when judging whether that person is…'disabled' under the [ADA]").

22. *See* ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2010)).

23. *See id.* (stating that one of the purposes of the Act is "to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures ").

24. *See id*. ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.").

25. *See* 42 U.S.C. § 12102(3)(A) ("An individual meets [this requirement] if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or a perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

26. ADA Amendments Act of 2008, § 2(b)(5) (2009).

27. *See* 42 U.S.C. § 12111(5)(A). Title I of the ADA is relevant for Housing Court employees and also, potentially, for employees for whom their employer provides housing. *See* H.R. REP. NO. 101-485, pt. 2, at 54–55 (1990) ("Title I of the [ADA] sets forth prohibitions against discrimination on the basis of disability by employers…with respect to hiring and all terms, conditions, and privileges of employment.…This section in [sic] intended to include the range of employment decisions…includ[ing]… fringe benefits available by virtue of employment….").

28. *See* 42 U.S.C. §§ 12131–12165.

29. *See id.* §§ 12181–12189.

30. *Id.* § 12131(1).

31. Tennessee v. Lane, 541 U.S. 509, 531 (2004). The Court found that "[T]itle II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 531. In reaching this conclusion, the Court noted that "[t] he Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Id.* at 523 (citing M.L.B. v. S.L.J., 519 U.S. 102, 132 (1996); Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

32. *See Lane*, 541 U.S. at 524–27.

33. *See* 42 U.S.C. § 12132 (2010) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

34. *See* 28 C.F.R. § 36.207(b) (2010) (noting that coverage of Title III "extends to those elements used to enter the place of public accommodation, including the homeowner's front sidewalk, if any, the door or entryway, and hallways; and those portions of the residence, interior or exterior, available to or used by customers or clients, including restrooms"); *see also* U.S. DEP'T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES, § III-1.2000, *available at* http://www.ada.gov/taman3.html (last visited Sept. 4, 2010) [hereinafter *Title III Technical Assistance Manual*] (explaining that "[a]lthough [T]itle III does not apply to strictly residential facilities, it covers places of public accommodation within residential facilities. Thus, areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the areas is not limited exclusively to owners, residents, and their guests").

35. *See* 28 C.F.R. § 36.207.

36. *See* 42 U.S.C. § 12131(2) (Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity"); *see also* 42 U.S.C. § 12182(b)(2)(A) (Title III defines "discrimination" to include "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations"). The term "reasonable modification" is used differently in the ADA than in the FHA. *Compare id.* (describing "reasonable modifications" as changes to "policies, practices, or procedures") *with* 42 U.S.C. § 3604(f)(3) (describing "reasonable modifications" as changes to "existing premises" and "reasonable accommodations" as changes to "rules, policies, practices, or services").

37. *See* 42 U.S.C. § 12132 (Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"); *see also* 42 U.S.C. § 12182(b)(2)(A) (defining discrimination under Title III to include denying a request for a reasonable modification).

38. A covered entity may also show that the person is disabled under the ADA only by virtue of being "regarded as" disabled, because the ADA Amendments Act clarifies that individuals who are disabled based on the "regarded as" prong are not entitled to reasonable accommodations or modifications. *See* ADA Amendments Act of 2008, Pub. L. No. 110–325, § 6(a)(1), 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2010)) ("A covered entity…need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.").

39. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001) (noting that Title III's reasonable modification provision "contemplates three inquiries: whether the requested modification is 'reasonable,' whether it is 'necessary' for the disabled individual, and whether it would 'fundamentally alter the nature of' the competition").

40. *See* 42 U.S.C. § 12182(b)(2)(A) (requiring that a modification requested under Title III be "necessary"); *see also* 28 C.F.R. § 35.130(b)(7) (requiring that a modification requested pursuant to Title II be "necessary").

41. *See* 42 U.S.C. § 12182(b)(2)(A) (noting that an entity covered by Title III does not have to make a reasonable modification if "such modification… would fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations" the covered entity offers); *see also* 28 C.F.R. § 35.130(b)(7) (requiring a public entity to make a reasonable modification "unless the public entity can demonstrate that making the modification…would fundamentally alter the nature of the service, program, or activity").

42. *See* 42 U.S.C. § 12182(b)(3) (noting that a public accommodation is not required to permit an individual who "poses a direct threat to the health or safety of others" to participate in the services it offers); U.S. DEP'T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES, § II-2.8000, *available at* http://www.ada.gov/taman2.html (last visited Sept. 4, 2010) [hereinafter *Title II Technical Assistance Manual*] (noting that an individual "who poses a direct threat to the health or safety of others" is not considered a qualified individual with a disability under Title II).

43. Title II Technical Assistance Manual, *supra* note 42, at § II-2.8000. With regard to Title III of the ADA, a fundamental alteration is defined as "a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered." *See* Title III Technical Assistance Manual, *supra* note 34, at § III-4.3600.

44. Title II Technical Assistance Manual, *supra* note 42, at § II-3.6100.

45. *See id*. at § II-5.1000.

46. 28 C.F.R. § 36.208(b). *See also, id*. § 36.208(c) (explaining that the covered entity must make "an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence").

47. *See* 42 U.S.C. § 12133 (providing that the remedies set forth by the Rehabilitation Act also apply to Title II). Damages are available under Title III only if the lawsuit is brought by the Attorney General. *See id.* § 12188; *see also,* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 378 (2000) ("When private parties bring suit under ADA Title III, they are only able to obtain injunctive relief and are not able to obtain monetary damages.").

48. 29 U.S.C. § 794(a) (2010).

49. Nancy Lawler Dickhute, *Jury Duty for the Blind in the Time of Reasonable Accommodations: The ADA's Interface with a Litigant's Right to a Fair Trial*, 32 CREIGHTON L. REV. 849 (1999) (discussing the application of the Rehabilitation Act to any court system that receives federal funding).

50. *See* Lauren French LaRochelle, *Dollars and Sense: Designing a Reasonable Accommodation under Section 504 of the Rehabilitation Act*, 69 OHIO ST. L. J. 525, 533–38 (2008); *see also* 24 C.F.R. § 8.33 ("Housing policies that the recipient can demonstrate are essential to the housing program or activity will not be regarded as discriminatory within the meaning of this section if modifications to them would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens.").

51. *See* 24 C.F.R. § 8.3 (defining "recipient" of federal financial assistance to mean "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance"); U.S. DEP'T OF HOUS. AND URBAN DEV., ACCESSIBILITY NOTICE CPD-05-09, SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE FAIR HOUSING ACT AND THEIR APPLICABILITY TO HOUSING PROGRAMS FUNDED BY THE HOME INVESTMENT PARTNERSHIPS PROGRAM AND THE COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM, *available at* http://www.nls.gov/offices/adm/hudclips/notices/cpd/05-09c.doc (last visited Sept. 4, 2010).

52. Joint Statement, *supra* note 6, at n.4. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF PUBLIC AND INDIAN HOUS., NOTICE PIH 2002-01(HA) *available at* http://www.hud.gov/offices/fheo/disabilities/PIH02-01.pdf (last visited Sept. 4, 2010) ("[Public Housing Agencies] and other recipients of Federal financial assistance are required to make and pay for structural modifications to dwelling units and common areas when needed as a reasonable accommodation for tenants or applicants with disabilities."); U.S. DEP'T OF HOUSING AND URBAN DEV., *Section 504: Frequently Asked Questions*, http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm (last visited Sept. 4, 2010) ("Section 504 requires that in making an accommodation, a federally assisted housing provider will be required to bear costs which do not amount to an undue financial and administrative burden. In application, this means that such a housing provider may be required to spend money to provide legally required reasonable accommodations.").

53. *See* 42 U.S.C. § 3604(a) (explaining that, in addition to individuals with disabilities, other protected classes under the FHA are race, color, national origin, sex, familial status, and religion).

54. *See id.* § 3602(h) (defining "handicap" to be "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment").

55. *Id.* § 3602(b).

56. *See* 24 U.S.C. § 3603(b)(1)–(2) (explaining that, in some circumstances, the FHA exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members). *See also* 24 U.S.C. § 3607(a) ("Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color or national origin.").

57. Although this article focuses on reasonable accommodations and modifications, entities covered by the FHA are also prohibited from (1) printing or publishing an advertisement regarding the sale or rental of a dwelling that indicates "any preference, limitation, or discrimination based on…handicap… or an intention to make any such preference, limitation, or discrimination." *See* 24 U.S.C. § 3604(c)–(f)(3) (defining "discrimination in the sale or rental of housing and other prohibited practices" to include: representing to "any person because of…handicap… that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available; inducing or attempting to induce, "[f] or profit…any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular…handicap" (also known as "blockbusting"); discriminating "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of" the buyer or renter or a person residing with or otherwise associated with the buyer or renter; discriminating "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of" that person or a person residing with or otherwise associated with the person; and failing to design and construct multifamily

dwellings built after March 13, 1991, in an accessible manner).

58. *Id.* § 3604(f)(3)(A) (emphasis added).

59. Joint Statement, *supra* note 6, at 3.

60. *See* John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 202 n.322 (2002). *See also* Michael Allen, *We Are Where We Live: Seniors, Housing, Choice, and the Fair Housing Act*, 31 HUM. RTS. 15, 16 (2004).

61. 42 U.S.C. § 3604(f)(3)(B). *See* Joint Statement, *supra* note 6, at 6.

62. Marks v. Bld'g Mgmt. Co., Inc., 2002 WL 764473, *4 (S.D.N.Y. 2002) (noting that a landlord "may be required to incur 'reasonable costs' to accommodate a plaintiff's handicap, he is not required to provide any accommodation that poses an 'undue hardship or a substantial burden'" (quoting Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 300, 1998 U.S. App. LEXIS 1873, *19 (2d Cir. 1998))). *But see* Evans v. UDR. Inc. 644 F. Supp. 2d 675, 682, 2009 U.S. Dist. LEXIS 31844, *19 (E.D.N.C. 2009). *See* Joint Statement, *supra* note 6, at 8.

63. Kellyann Everly, Comment, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims,* 29 DAYTON L. REV. 37, 60 (2003).

64. *See* Joint Statement, *supra* note 6, at 8.

65. *See id.* at 7 ("A housing provider can deny a request for a reasonable accommodation if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, a request for a reasonable accommodation may be denied if providing the accommodation is not reasonable—*i.e.*, if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations.").

66. *See* 42 U.S.C. § 3604(f)(9) (noting that the FHA does not require "that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others"). If a landlord believes that a tenant poses a direct threat, "the landlord is obligated to either reasonably accommodate the tenant's handicap or show that no reasonable accommodation will eliminate or acceptably minimize the risk posed by the handicapped tenant." Arnold Murray Constr., L.L.C. v. Hicks, 621 N.W.2d 171, 175 (Sup. Ct. S.D. 2001). *Accord* Roe v. Sugar River Mills Assocs., 820 F. Supp. 636, 640 (D.N.H. 1993) ("[T]he Act requires defendants to demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk [the tenant] poses to other residents… before they may lawfully evict him."); Roe v. Hous. Auth. of City of Boulder, 909 F. Supp. 814, 822–23 (D. Colo. 1995) ("[A]ssuming [the tenant] is handicapped or disabled, before he may lawfully be evicted [the landlord] must demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize any risk [the tenant] poses to other residents…."). *But see* Evans v. UDR, Inc., 644 F. Supp. 2d 675, 685 (E.D.N.C. 2009) (granting summary judgment for the prospective landlord after finding that the causal connection between a prospective tenant's mental disability and his criminal conviction "is insufficient for purposes of the FHA" to require the prospective landlord to modify its general prohibition against renting to individuals who have a criminal record).

67. 42 U.S.C. § 3604(f)(3)(A).

68. *See id.* §§ 3612(g)(3), 3613(c)(1), 3614(d)(1)(A).

69. *See id.* §§ 3612(g)(3), 3613(c)(1), 3614(d)(1)(B).

70. *See id. at* § 3613(c)(1).

71. *See id. at* §§ 3612(p), 3613(c)(2), 3614(d)(2).

72. United Veterans Mut. Hous. No. 2 Corp. v. N.Y. City Comm'n on Human Rights, 207 A.D.2d 551, 552, 616 N.Y.S.2d 84, 85 (2d Dep't 1994) (citing 42 U.S.C. §§ 3604(f)(3), (8)).

73. *See, e.g.*, N.Y. EXEC. LAW § 296(5) (Consol. LEXIS 2010) (prohibiting housing discrimination based on "race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status").

74. *See id.* § 292(21). Unlike the ADA Amendments Act, the New York State Human Rights Law (NYSHRL) does not appear to exclude people who are merely regarded as having an impairment from enjoying the right to reasonable accommodations. *Id.*

75. *Id.*

76. *Compare id. with* 42 U.S.C. § 12102(1). *See* Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 705–06 (S.D.N.Y. 1997) (granting summary judgment for the employer with respect to the employee's ADA claim but denying it with respect to the employee's NYSHRL and New York City Human Rights Law (NYCHRL) claims after concluding that the definitions of disability in the state and local law "are substantially broader than the definition of 'disability' under the ADA"); State Div. of Human Rights ex rel. McDermott v. Xerox Corp., 65 N.Y.2d 213, 218–20, 480 N.E.2d 695, 698 (1985) (noting that the NYSHRL defines the term "disability" "more broadly" than the Rehabilitation Act because it "provides that disabilities are not limited to physical or mental impairments, but may also include 'medical' impairments" and that, "to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being 'demonstrable by medically accepted clinical or laboratory diagnostic techniques'"); *see also* Dennis A. Lalli, Remarks at the Employment Law Litigation Institute at St. John's University School of Law: A Comparison of the Definition of "Disability" in the Americans With Disabilities Act, The New York State Human Rights Law, and The New York City Human Rights Law (May 11-12, 2001) ("The lack of adjectival qualifiers like those contained in the ADA's definition of 'disability' suggests that the NYSHRL's definition is much broader than that of the ADA….") *available at* http://www.kmm.com/articles-38.html (last visited Sept. 4, 2010).

77. *See* N.Y. EXEC. LAW § 296(5) (Consol. LEXIS 2010).

78. *Id.* § 292(10). The NYSHRL also applies to "publicly-assisted housing accommodations," which includes "public housing" and "housing operated by housing companies under the supervision of the commissioner of housing." *Id.* § 292(11).

79. *See id.* § 296(5)(a).

80. 42 U.S.C. § 3602(b) (2010).

81. N.Y. EXEC. LAW § 292(10).

82. *See id.* § 292(21-e) ("The term 'reasonable accommodation' means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.").

83. *Id.* §§ 296(2-a)(d)(2), 296(18)(2).

84. *Id.* §§ 296(2-a)(d)(1), 296(18)(1). *See* 42 U.S.C. § 3604(f).

85. For example, like the Federal Housing Authority (FHA), the NYSHRL allows a landlord to "condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted." N.Y. EXEC. LAW §§ 296(2-a)(d)(1), 296(18)(1).

86. *See id.* § 297(4)(c)(i)–(ii).

87. *See id.* § 297(4)(c)(iii).

88. *See id.* § 297(4)(c)(iv).

89. *See id.* § 297(10).

90. *See, e.g.*, N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-107(5)(a)(1) (LEXIS through 2010) (prohibiting housing discrimination based on "actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person, or because children are, may be or would be residing with such person or persons"). *See also* N.Y. EXEC. LAW § 296(5).

91. N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-102(16)(a)-(b) (defining the term "physical, medical, mental, or psychological impairment" as "(1) An impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or (2) A mental or psychological impairment").

92. *Compare* N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-102(16), *with* N.Y. EXEC. LAW § 292(21). *See generally* Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 706 (finding that under the NYCHRL, "an individual's impairment need not substantially limit a major life activity, prevent a normal bodily function or even be demonstrable by medically accepted techniques. It is enough that the condition impairs any body system") (internal citations omitted).

93. *See* N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-107(5)(a)(1); *see also* N.Y. EXEC. LAW §296(5).

94. *Compare* N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-102(10) *with* N.Y. EXEC. LAW § 292(10). The NYCHRL's prohibition against housing discrimination does not apply to residents of two-family houses if the owner or a member of the owner's family resides in one of the housing accommodations and if the available housing accommodation was not advertised. *See* NEW YORK, N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-107(5)(a)(4)(1). In addition, the NYCHRL does not cover those who rent a room or rooms in a private housing accommodation where the owner resides. *See id.* § 8-107(5)(a)(4)(2).

95. *See id.* § 8-102(11).

96. *Id.* § 8-102(18).

97. *Id.*

98. *See* John P. Herrion, *Developments in Housing Law and Reasonable Accommodations for New York City Residents with Disabilities*, 27 FORDHAM URB. L.J. 1295, 1296–97 (2000) ("Conspicuously missing from the NYC Law is any requirement or obligation upon the person with a disability to pay for or provide the necessary accommodation.…This omission creates a large distinction between the provisions of the NYC Law and those of the FHA and the State Law, and has raised many questions as to who should actually bear the cost of providing the accommodation.").

99. *See, e.g.*, Comm'n on Human Rights ex rel. Raymond v. 325 Coop. Inc., No. 1432/98 (N.Y.C. Commission Human Rights Jan. 12, 1999), 1999 WL 152526, at *1-2 (Comm'n Hum. Rts. Jan. 12, 1999) (requiring respondents to build a ramp, install door openers on the elevator doors and on the lobby door, and pay the complainant $15,000 in compensatory damages); In re T.K. Mgmt., Inc. v. Gatling, Index No. 14255/05, at 11-14, N.Y. L.J., Nov. 2, 2005, at 19, col. 3 (Sup. Ct. Queens County Oct. 19, 2005) (unpublished opinion) (denying request to annul New York City Commission on Human Rights's rejection of undue hardship burden defense in requiring petitioners to install a ramp, widen doors, and install a lift in the lobby of the subject premises).

100. *See* N.Y. ADMIN. CODE tit. 8, ch. 1, § 8-102(18) (explaining that "in making a determination of undue hardship, the factors include, but are not limited" to: "(a) the nature and cost of the accommodation"; "(b) the overall financial resources of the facility or the faculties involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility"; "(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities"; and "(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.").

101. *See id.* §§ 8-120(a)(7), 8-402(a), 8-502(a).

102. *See id.* §§ 8-120(a)(8), 8-402(a), 8-502(a).

103. *See id.* §§ 8-402(a), 8-502(a).

104. *See id.* § 8-502(f).

105. Joint Statement, *supra* note 6, at 10.

106. For the role of Guardian Ad Litems in Housing Court, see generally Gerald Lebovits & Michael Gervasi, *Guardians and Guardians Ad Litem in New York*, 8 RICHMOND COUNTY B. ASS'N J. 7 (Fall 2009). *See also* Gerald Lebovits, Matthias W. Li & Shani R. Friedman, *Guardians Ad Litem in Housing Court*, 37 N.Y. REAL PROP. L. J. 48 (Winter 2009); Jeanette Zelhof, Andrew Goldberg & Hina Shamsi, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 733 (2006).

107. Joint Statement, *supra* note 6, at 10.

108. Some organizations provide sample reasonable accommodation letters. *See, e.g.*, *Rights of Tenants With Disabilities*, SOUTH BROOKLYN LEGAL SERVICES (April 1, 2007), http://www.sbls.org/index.php?id=83 (last visited Sept. 4, 2010).

109. Joint Statement, *supra* note 6, at 11.

110. *Id.*

111. *See id.* at 11–14.

112. *Id.* at 10.

113. *See id.*

114. *See id.*

115. *Americans with Disabilities (ADA): Frequently Asked Questions*, NYCOURTS.GOV, http://www.nycourts.gov/accessibility/faqs.shtml (last visited Sept. 4, 2010) [hereinafter *ADA FAQS*].

116. *See id.* For the contact information for ADA liaisons, see *ADA Liaisons Directory*, NYCOURTS.GOV, http://www.nycourts.gov/accessibility/listbycounty.shtml (last visited Sept. 4, 2010) [hereinafter *ADA Liaisons Directory*]. Other states have adopted similar systems for receiving and processing requests for reasonable accommodations. *See, e.g.*, CAL. RULES OF CT. § 1.100(b) (2010), *available at* http://www.courtinfo.ca.gov/rules/index.cfm?title=one&linkid=rule1_100 (last visited Sept. 4, 2010) (specifying that "[i]t is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system" and that "each superior and appellate court must delegate at least one person to be the ADA coordinator…to address requests for accommodations"). Witnesses, jurors, attorneys, litigants, or any other person "with an interest in attending any proceeding before any court of [California]" can request a reasonable accommodation "on a form approved by the Judicial Council, in another written format, or orally." *Id.* § 1.100(a)(2)–(c); *see Request for Accommodations by Persons with Disabilities and Response*, JUDICIAL COUNCIL OF CALIFORNIA, http://www.courtinfo.ca.gov/forms/fillable/mc410.pdf (last visited Sept. 4, 2010).

117. *See* ADA FAQS, *supra* note 115, *How Do I Request An Accommodation?*

118. *See id.*

119. *See id.*; *see also Denial of Accommodation Requested by Court User*, NYCOURTS.GOV, http://www.nycourts.gov/accessibility/PDFs/denial_of_Accommodation.pdf (last visited Sept. 4, 2010) (explaining that this form is used to comply with the Department of Justice's regulations

regarding the accessibility of public entities) (citing 28 C.F.R. §§ 35.160, 35.164 (2010)).

120. *See* ADA FAQS, *supra* note 115, *How Will I Know My Request Has Been Denied?*

121. *See id.*; *see also* ADA Liaisons Directory, *supra* note 116 ("[I]f a request for accommodation is made to the judge during the proceeding, it is that judge who will determine the appropriateness of the request.").

122. *See* ADA FAQS, *supra* note 115, *Can Teleconferencing Be Considered As An Accommodation For A Hearing Or Other Court Proceeding?* ("[O]n a case-by-case basis, and with approval of the judge, telephone conferencing has been used as a way to accommodate people who cannot leave their homes or who will have difficulty accessing the court building.").

123. *See* N.Y. EXEC. LAW § 297(9); N.Y., R.C.N.Y. tit. 28, ch. 10, § 8-109(f)(ii) (LEXIS, NY Library, NYCMUN File). Similarly, individuals who file a civil-court action cannot file an administrative claim based on the same allegations. *See* N.Y.C.R.R. tit. 9, ch. VIII, § 8-502(a) (allowing an aggrieved person to file a civil action "unless such person has filed a complaint with the City Commission on Human Rights or with the State Division of Human Rights with respect to such alleged unlawful discriminatory practice"); Madison Park Owners Corp. v. Andrews, 23 Misc. 3d 1107A, 886 N.Y.S.2d 67, 2009 N.Y. Slip Op. 50628(U), *1–2 (Dist. Ct. Nassau County 2009) (dismissing respondent-tenants' affirmative defenses and counterclaims that were simultaneously asserted in a complaint filed with the New York State Division of Human Rights because the NYSHRL "undisputably [sic] creates an election of remedies that are mutually exclusive").

124. *See* 42 U.S.C. § 3612(f) (2010) ("An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice."); *id*. § 3613(a)(3) ("An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.").

125. *See* 28 C.F.R. § 35.170(c) (2010). If the complaint is under the Rehabilitation Act, the person may also file directly with "any [federal] agency that provides funding to the public entity that is the subject of the complaint." *Id.*

126. *See id.* § 35.170(b).

127. *See* 42 U.S.C. § 3610(a)(1)(A)(i) (2010). A complaint can be filed online or, in New York, by calling (800) 496-4294. *See Filing Your Housing Discrimination Complaint Online*, HUD.GOV, http://www.hud.gov/offices/fheo/online-complaint.cfm (last visited Sept. 4, 2010).

128. *See* 42 U.S.C. § 3610(f)(3)(A).

129. *See Fair Housing Assistance Program (FHAP) Agencies*, HUD.GOV, http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Sept. 4, 2010). Localities can also be certified as substantially equivalent. *See Substantial Equivalence Certification*, HUD.GOV, http://www.hud.gov/offices/fheo/partners/FHAP/equivalency.cfm (last visited Sept. 4, 2010) ("Substantial equivalence certification takes place when a State or local agency applies for certification and the U.S. Department of Housing and Urban Development (HUD) determines that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act."). The Rockland County Commission on Human Rights, Geneva Human Rights Commission, and Westchester County Human Rights Commission have been certified, but the New York City Commission on Human Rights has not.

130. *See How to File a Complaint*, NEW YORK STATE DIVISION OF HUMAN RIGHTS, http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited Sept. 4, 2010) (explaining the procedure for filing a complaint with the New York State Division of Human Rights).

131. *See* N.Y. EXEC. LAW § 297(5) (Consol. LEXIS 2010).

132. *See* N.Y.C.R.R. tit. 9, ch. VIII, § 8-109(e) (Consol. LEXIS 2010).

133. *See* N.Y. C.P.L.R. 2201 (Consol. LEXIS 2010) ("Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."); 170 W. 85 St. HDFC v. Jones, 176 Misc. 2d 262, 265, 673 N.Y.S.2d 830, 832 (Civ. Ct. N.Y. County 1998) (finding that Civ. Ct. Act § 212 "allows the civil court to exercise 'all of the powers that the supreme court would have in like actions and proceedings.' These powers include the imposition of a stay").

134. E. 72nd Realty, LLC v. Dakisk, N.Y. L.J., Aug. 26, 1998, at 22, col. 6 (Civ. Ct. N.Y. County 1998) (staying holdover proceeding because "the disposition of respondent's [disability] discrimination complaint filed with HUD is potentially dispositive of the instant proceeding") (citing Society of the N.Y. Hosp. v. San Filippo, N.Y. L.J., Aug 19, 1982, at 6, col. 1 (Sup. Ct. App. T. 1st Dep't 1982)); Moskowitz v. Archer, N.Y. L.J., Feb. 14, 1986, at 12, col. 6 (Sup. Ct. App. T. 1st Dep't) (noting that tenant Dakisk had filed his complaint with HUD earlier in the same day that the petitioner had filed the petition against him in Housing Court. Thus, presumably, the respondent had already received the requisite notice before he filed a complaint with HUD). *See* Mozaffari v. Schatz, 12 Misc. 3d 1162A, 1162A, 819 N.Y.S.2d 211, 211, 2006 N.Y. Slip Op. 51001(U), *2 (Civ. Ct. N.Y. County 2006) (Gerald Lebovits, J.) ("When a discrimination complaint implicates the subject living accommodation, a stay will be granted unless the Petitioner can establish an independent nondiscriminatory basis for seeking possession of the subject apartment.") (citing Ennismore Apts. v. Gottlieb, N.Y. L.J., Sept. 24, 1992, at 24, col. 5 (Sup. Ct. App. T. 1st Dep't 1992)). *But see* Crotona Park W. v. Aponte, N.Y. L.J., Mar. 20, 2002, at 22, col. 2 (Civ. Ct. Bronx County 2002) (denying motion for a stay in a nuisance proceeding because "[i]f the petitioner can sustain its burden of proof that a nuisance exists, the respondent will have no choice but to either remove the dog from the subject premises" whether or not HUD finds that "petitioner was, in fact, acting in a discriminatory manner").

135. *See, e.g.*, *Mozaffari*, 12 Misc. 3d at 1162A, 819 N.Y.S.2d at 211, 2006 N.Y. Slip Op. 51001(U) at *2.

136. *See, e.g.*, 90-10 149th St. v. Badillo, N.Y. L.J., Mar. 8, 2000, at 30, col. 5 (Civ. Ct. Queens County 2000) ("[W]here an administrative agency has particular expertise in considering an issue, and ultimate disposition of the summary proceeding may necessarily hinge upon the agency's findings, a stay of the summary proceeding pending a factual determination by the administrative agency is preferable.").

137. *See, e.g.*, 170 W. 85 St. HDFC v. Jones, 176 Misc. 2d 262, 264–70, 673 N.Y.S.2d 831, 835 (staying a holdover proceeding based on C.P.L.R. 2201 and Civ. Ct. Act § 212 for the New York City Commission on Human Rights to decide respondent's pending complaint based on alleged discrimination based on disability, sexual orientation, and marital status); Mora v. Dibartolo, N.Y. L.J., Feb. 8, 1995, at 27, col. 2 (Civ. Ct. N.Y. County 1995) (staying a "chronic delinquency" holdover proceeding because "respondents filed a complaint with the City of New York Commission on Human Rights…prior to the commencement of this proceeding").

138. *See Mora,* N.Y. L.J., Feb. 8, 1995, at 27, col. 2 (requiring the payment of monthly use and occupancy "during the pendency of the stay").

139. *See* N.Y. Real Prop. Law § 743; Hudson View Props. v. Weiss, 59 N.Y.2d 733, 735, 463 N.Y.S.2d 428, 429 (1983); Elisau Estates v. Schrager, 136 Misc. 2d 289, 291–92, 518 N.Y.S.2d 712, 714–15 (Civ. Ct. N.Y. County 1987). This is also true in most other states. *See also Using Reasonable Accommodations to Prevent Eviction*, Bazelon Center for Mental Health Law, http://www.bazelon.org/issues/housing/infosheets/fhinfosheet4.html (last visited Sept. 4, 2010) [hereinafter *Prevent Eviction*] ("It is now clearly established in most states that courts must consider defenses and counterclaims under the Fair Housing Act as part and parcel of the eviction proceeding itself.").

140. Andrew Scherer, Residential Landlord-Tenant Law in New York § 3.61 (2009-2010 ed.) (citing Brussels Leasing LP v. Young, N.Y. L.J., June 14, 2000, at 34, col. 1 (Civ. Ct. Queens County)). *See id.* at § 11:39 ("The tenant can raise unlawful discrimination as a defense to the proceeding. He/she can also interpose a counterclaim for punitive damages where it can be shown that the eviction is motivated by unlawful discrimination.") (citing Pleasant E. Assocs. v. Cabrera, 125 Misc. 2d 877, 883, 480 N.Y.S.2d 693, 697 (Civ. Ct. N.Y. County 1984)).

141. U.S. Const. art. VI, cl. 2. *See* Rodriguez v. Westhab, Inc., 833 F. Supp. 425, 426 (S.D.N.Y. 1993) ("[S]tate trial and appellate courts in which eviction controversies are pending have, pursuant to the Supremacy Clause of the Federal Constitution, the jurisdiction and authority to rule upon federal defenses….").

142. *See, e.g.*, Committed Cmty. Assocs. v. Croswell, 171 Misc. 2d 340, 343, 659 N.Y.S.2d 691, 693 (2d Dep't 1997) ("[T]he need for speedy dispositions in landlord-tenant matters ordinarily dictates that counterclaims be severed unless they are in essence a defense to landlord's claim or so intertwined with such a defense as to become part and parcel thereof."); Smalkowski v. Vernon, 2001 N.Y. Slip Op. 40071(U), *8–9 (Civ. Ct. Kings County 2001) ("[T]he court finds that [the tenant's federal race and disability discrimination counterclaims] would be better litigated in a plenary proceeding…rather than in…this summary proceeding in the housing court, which was created for the purpose of enforcing state and local laws for the establishment and maintenance of housing standards.") (internal quotation marks omitted)). *See also* Tellock v. Davis, 2002 WL 31433589, at *4 (E.D.N.Y. 2002) ("Defendants concede that Tellock's federal claims cannot be brought in the Civil Court…. Their concession is well founded, as the Civil Court has ruled that it will take jurisdiction over Tellock's state law retaliatory eviction claim, but has declined to take jurisdiction over Tellock's federal discrimination claims. New York case law supports the proposition that Tellock's federal racial discrimination claims cannot be brought in the Civil Court proceeding.") (citing *Committed Cmty. Assocs.*, 171 Misc. 2d at 343, 659 N.Y.S.2d at 693; *Smalkowski*, 2001 N.Y. Slip Op. 40071(U) at *8–9)).

143. Scherer, *supra* note 140, at § 3:61 (citing Brussels Leasing LP, N.Y. L.J., June 14, 2000, at 34, col. 1).

144. *See Handling Fair Housing Act Disability Claims in the Context of an Imminent or Pending Eviction Action*, Bazelon Center for Mental Health Law (last visited Sept. 4, 2010). http://www.bazelon.org/LinkClick.aspx?fileticket=HxFJ6uskzps%3D&tabid=245 (last visited Sept. 4, 2010) [hereinafter *Handling Fair Housing Act Disability Claims*] ("[S]tate courts are sometimes inhospitable forums for FHA claims because the judges lack expertise in civil rights law and view these claims as complicated.").

145. *See* Broome Realty Assocs. v. Sek Wing Eng, 182 Misc. 2d 917, 918, 703 N.Y.S.2d 360, 361 (Sup. Ct. App. T. 1st Dep't 1999) ("Except for proceedings for the enforcement of housing standards and applications for certain provisional remedies, the New York City [Housing Court] may not grant injunctive relief.") (internal citations omitted); *170 W. 85 St. HDFC*, 176 Misc. 2d at 267, 673 N.Y.S.2d at 833 (noting that Housing Court's "equitable jurisdiction is limited").

146. *See Smalkowski*, 2001 N.Y. Slip Op. 40071(U) at *8 ("Especially since possession of the apartment is no longer at issue here, the court finds that [the respondent's disability and race discrimination] claims would be better litigated in a plenary proceeding, where discovery is available as of right, rather than in the balance of this summary proceeding in the housing court…."). *See generally* Gerald Lebovits, Rosalie Valentino, & Rohit Mallick, *Disclosure and Disclosure-Like Devices in the New York City Housing Court*, 37 N.Y. Real Prop. L. J. 34 (Summer 2009).

147. *See, e.g.*, Clinton Ass'n for a Renewed Env't, Inc. v. Baines, L&T Index No. 099230/2007, at 2–4 (Civ. Ct. N.Y. County 2009) (Gerald Lebovits, J.) (unpublished opinion) (granting leave to conduct limited disclosure regarding the respondent's disability because the respondent asserted an affirmative defense requesting a reasonable accommodation under the FHA).

148. *See* Bd. of Regents v. Tomanio, 446 U.S. 478, 488 (1980) ("[W]hen Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless 'borrowed' what it considered to be the most analogous state statute of limitations.").

149. *See* Maccharulo v. Gould, 643 F. Supp. 2d 587, 592–93 (S.D.N.Y. 2009) ("In New York, claims brought under…ADA Title II, and the Rehabilitation Act are governed by the three-year statute of limitations provided by Section 214(5) of the New York Civil Practice Law and Rules.") (citing Gardner v. Wansart, 2006 WL 2742043, *3 (S.D.N.Y. 2006)).

150. *See* 42 U.S.C. § 3613(a)(1)(A) (2010).

151. *See* N.Y. Exec. Law § 297(9).

152. *See* Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 306–07, 448 N.E.2d 86, 92–93, 461 N.Y.S.2d 232, 238–39 (1983) (citing N.Y. C.P.L.R. § 214(2)) (superseded by statute); N.Y. Admin. Law § 8-502(d) (LEXIS, NY Library, NYADMIN File).

153. *Cf.* Gray v. Hernandez, 22 Misc. 3d 678, 679, 683–85, 868 N.Y.S.2d 500, 501, 504–05 (Sup. Ct. N.Y. County 2008) (denying tenant's request for an injunction as untimely after having granted tenant's request for a temporary restraining order to stay a Housing Court proceeding,).

154. *See* 42 U.S.C. §§ 12133 (ADA Title II),12188(a)(1) (ADA Title III); 29 U.S.C. § 794a; *id*. § 3613(a)(1)(A).

155. *See* United Mut. Houses, L.P. v. Anduiar, 230 F. Supp. 2d 349, 354 (S.D.N.Y. 2002) (remanding to state court because the tenant was not entitled to remove Housing Court proceeding to federal court). *See also* Arslan v. Sunnyside Realty Corp., 2007 WL 1350438, at *2 (E.D.N.Y. May 8, 2007); McAllan v. Malatzky, 1998 WL 24369, at *2–3 (S.D.N.Y. 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999).

156. Galland v. Margules, 2005 WL 1981568, at *1 (S.D.N.Y. 2005). *See* Rosquist v. St. Marks Realty Assocs., LLC, 2008 WL 2965435, *2 (E.D.N.Y. 2008); DiNapoli v. DiNapoli, 1995 WL 555740, *1 (S.D.N.Y. 1995); Chiania v. Broadmoor Assocs., 1994 WL 30412, *1 (S.D.N.Y. 1994).

157. N.Y. C.P.L.R. 2201 ("Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."); 3211(a)(4) ("A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:…there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires…."); *see, e.g.*, Twenty Seven Naught One Assocs. v. Tirado, N.Y. L.J., Nov. 29, 1995, at 28, col. 5 (Civ. Ct. Bronx County) (staying Housing Court proceeding based on a federal sex-discrimination lawsuit the respondent filed after respondent was sued in Housing Court).

158. 28 U.S.C. § 2283; *see also* Yagan v. Dougherty, No. 5:10-CV-528 (NPM/ATB),

2010 WL 2594790, at *8 (N.D.N.Y June 9, 2010) (stating that "the law is well-settled that with rare exceptions, a federal court may not enjoin pending state court proceedings").

159. *See, e.g.*, O'Neill v. Hernandez, No. 08 Civ. 1689 (KMW), 2008 WL 2662981, at *4 (S.D.N.Y. June 24, 2008) ("Plaintiff's eviction from his apartment would not 'seriously impair [this] court's flexibility and authority to decide Plaintiff's claims raised under the Brooke Amendment, the FHAA, Title VII, the ADA, Section 504, or New York law.") (citing Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970)); Sierra v. City of New York, 528 F. Supp. 2d 465, 468 (S.D.N.Y. 2008) (citing Casa Marie, Inc. v. Super. Ct., 988 F.2d 252, 261-62 (1st Cir. 1993)); Rodriguez, 833 F. Supp. at 428 ("Should a local court erroneously decline to entertain federal defenses contrary to the Supremacy Clause, reconsideration on its part or consideration of the defense by whatever state court hears appeals from decisions of the local court would be the proper remedy. Collateral interference by a United States district court pursuant to a separate lawsuit involving whether a state court order should be implemented would be improper under the Anti-Injunction Act (28 U.S.C. § 2283) where a state proceeding dealing with the same subject matter has commenced, unless such interference was expressly authorized by federal statute, where necessary in aid of its jurisdiction or to protect or effectuate its judgments.").

160. *See* Blalock v. Amityville Senior Dev. Corp., N.Y. L.J., Nov. 12, 1999, at 36, col. 3 (E.D. N.Y. 1999) (granting a preliminary injunction under the FHA to enjoin a landlord from "from continuing to prosecute its pending state court eviction against [a person with a disability]"); Handling Fair Housing Act Disability Claims, *supra* note 144, at 8 ("Although federal courts may not be able to enjoin state court proceedings, some may be able to enjoin the parties themselves from proceeding with the eviction."). *But see* Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F.2d 387, 392 (5th Cir. 1969) (noting that the Anti-Injunction Act "applies irrespective of whether the federal injunction is directed to the parties or to the state courts.").

161. Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).

162. *See* Handling Fair Housing Act Disability Claims, *supra* note 144, at 8 ("The Anti-Injunction Act does not prevent the court from issuing injunctions against the institution of state court proceedings but only bars injunctions against ongoing proceedings.").

163. *Id.*

164. Atl. Coast Line R.R. Co., 398 U.S. at 296 (stating that lower federal courts possess no power to sit in direct review of state court decisions).

165. Hoblock v. Albany County Bd. of Elec., 422 F.3d 77, 84 (2d Cir. 2005).

166. Green v. Mattingly, 585 F.3d 97, 101 (2d Cir. 2009). Note that this standard was set by the U.S. Supreme Court in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) (cautioning that that the *Rooker-Feldman* doctrine is meant to occupy 'narrow ground' and noting that the Second Circuit previously applied the doctrine too expansively).

167. *See, e.g.*, Reyes v. Fairfield Props., 661 F. Supp. 2d 249, 258-59, 266-677, 272 (E.D.N.Y 2009) (invoking the *Rooker-Feldman* doctrine to dismiss the plaintiffs' "unlawful eviction claim" but refusing to dismiss portions of plaintiffs' reasonable accommodations claim under the FHA and noting that plaintiffs' "purported concession to being a holdover tenant does not mean that plaintiffs cannot establish as a matter of law that a retaliatory motive played a part in the holdover proceeding"); Karamoko v. N.Y. City Hous. Auth., 170 F. Supp. 2d 372, 376-78 (S.D.N.Y. 2001) (holding that plaintiff's claims for injunctive and declaratory relief were barred by the *Rooker-Feldman* doctrine but that her federal claims for damages based on alleged disability discrimination were not because monetary damages were not available in the relevant state court proceeding).

168. *See* Andujar v. Hewitt, No. 02 CIV. 2223(SAS), 2002 WL 1792065, at *6 (S.D.N.Y. Aug. 2, 2002) (holding *Rooker-Feldman* doctrine inapplicable because the "decisions" in question were merely a denial of a motion to dismiss and a denial of summary judgment instead of an ultimate judgment of possession); *see also Hoblock*, 422 F.3d at 89 (noting that "federal suits challenging interlocutory state judgments may present difficult questions as to whether 'the state proceedings have "ended" within the meaning of *Rooker-Feldman* on the federal questions at issue'").

169. King v. Fox, 418 F.3d 121, 131 (2d Cir. 2005); *see Rosquist*, 2008 WL 2965435, at *4; Springer v. Lincoln Shore Owners, Inc., No. 03-CV-4676 (FB)(KAM), 2007 WL 2403165, at *4-5 (E.D.N.Y. Aug. 16, 2007) (holding that plaintiffs' federal reasonable accommodation claim is barred by res judicata because they could have raised it as a defense in the Housing Court proceeding, which resulted in the termination of their lease). *But see Karamoko*, 170 F. Supp. 2d at 377 (holding that plaintiff's federal claims for damages based on alleged disability discrimination was not barred by res judicata because monetary damages were not available in earlier Article 78 proceeding).

170. Marvel Characters, Inc. v. Simon, 310 F.3d 280, 288-89 (2d Cir. 2002); *see Reyes*, 661 F. Supp. 2d at 276-77 (holding that collateral estoppel bars the plaintiffs' "unlawful eviction claim" but that it does not bar plaintiffs' FHA claims); *Karamoko*, 170 F. Supp. 2d at 377 (holding that plaintiff's claims for damages based on alleged disability discrimination were not barred by collateral estoppel).

171. *See, e.g.*, Kimberly E. O'Leary, *The Inadvisability of Applying Preclusive Doctrines to Summary Evictions*, 30 U. TOL. L. REV. 49, 96 (1998) ("Decisional law that requires defendants to raise claims against plaintiffs in [summary] proceedings or forever lose their right to do so are fundamentally unfair.").

172. *See* N.Y. EXEC. LAW § 292(31) ("The term 'guide dog' means any dog that is trained to aid a person who is blind by a recognized guide dog training center or professional guide dog trainer, and is actually used for such purpose.").

173. *See id.* § 292(32) ("The term 'hearing dog' means any dog that is trained to aid a person with a hearing impairment by a recognized hearing dog training center or professional hearing dog trainer, and is actually used for such purpose.").

174. *See id.* § 292(33) ("The term 'service dog' means any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose."). Because services performed by emotional-support animals are generally less tangible than the services performed by guide or hearing dogs, requests for reasonable accommodations involving emotional-support animals or other service dogs are somewhat more controversial than those involving guide and hearing dogs; *see also* Rebecca Skloot, *Creature Comforts*, N.Y. TIMES, Dec. 31, 2008, *available at* http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html?pagewanted=all (last visited Sept. 4, 2010).

175. *See* Echeverria v. Krystie Manor, LP, No. CV 07-1369(WDW), 2009 WL 857629, at *7-8 (E.D.N.Y. Mar. 30, 2009) (denying summary judgment regarding a reasonable accommodation claim under the FHA and the NYSHRL because issues of material fact existed with regard to whether allowing her to keep a service dog was a necessary accommodation); Crossroads Apts. Assocs. v. LeBoo, 152 Misc. 2d 830, 833-35, 578 N.Y.S.2d 1004, 1006-07 (Rochester City Ct. 1991) (denying petitioner's motion for summary judgment because respondent

raised genuine issues of material fact regarding his request for a reasonable accommodation under the Rehabilitation Act and the FHA by submitting affidavits from a treating psychiatrist, a clinical social worker, and a certified pet-assisted therapist stating that the emotional support animal was necessary for the claimant's use and enjoyment of his apartment); Ocean Gate Assocs. Starrett Sys., Inc. v. Dopico, 109 Misc. 2d 774, 775, 441 N.Y.S.2d 34, 35 (Civ. Ct. Kings County 1981) (denying a motion for summary judgment because the tenant provided, among other things, affidavits from a physician and a veterinarian regarding the "necessary security function" the service dog serves for the tenant).

176. *See* In re Kennedy St. Quad, Ltd. v. Nathanson, 62 A.D.3d 879, 880, 879 N.Y.S.2d 197, 198-99 (2d Dep't 2009) (annulling New York State Division of Human Rights determination because the complainants "failed to present any medical or psychological evidence to demonstrate that the dog was actually necessary in order for them to enjoy the apartment"); In re 105 Northgate Co-op. v. Donaldson, 54 A.D.3d 414, 416, 863 N.Y.S.2d 469, 470 (2d Dep't 2008) (annulling New York State Division of Human Rights discrimination finding because "the complainant failed to demonstrate, through either medical or psychological expert testimony or evidence, that she required a dog in order to use and enjoy her apartment unit"); In re One Overlook Ave. Corp. v. N.Y. St. Div. of Human Rights, 8 A.D.3d 286, 287, 777 N.Y.S.2d 696, 696 (2d Dep't 2004) (granting Article 78 petition that the New York State Division of Human Right's determination was not supported by substantial evidence because "the complainant failed to demonstrate through either medical or psychological expert testimony or evidence that her son required a dog in order for him to use and enjoy the apartment"); In re Durkee v. Staszak, 223 A.D.2d 984, 985, 636 N.Y.S.2d 880, 881-82 (3d Dep't 1996) (affirming determination that petitioner in ADA and Rehabilitation Act case involving the provision of emergency housing had failed to establish that he was emotionally dependent on his dog); Landmark Props. v. Olivo, 5 Misc. 3d 18, 21, 783 N.Y.S.2d 745, 748 (Sup. Ct. App. T. 2d Dep't 9th & 10th Jud. Dists. 2004) (affirming denial of a reasonable accommodation claim because the tenant "submitted only the ambiguous statement of his physician that depressed people may benefit from having pets and notes from his medical records that he was anxious about possibly losing his dog"); In re Contello Towers Corp. v. N.Y. City Dep't of Hous. Pres. & Dev., N.Y. L.J., Nov. 17, 2004, at 19, col. 1 (Sup. Ct. Kings County) (granting Article 78 because "there is no evidence in the record to establish that allowing an exception to the no-pet rule in this instance was necessary to afford [the tenant] equal opportunity to use and enjoy the apartment").

177. See United States v. Tanski, No. 1:04-CV-714, 2007 U.S. Dist. LEXIS 23606, at *73-79 (N.D.N.Y. Mar. 30, 2007) (permitting FHA reasonable accommodation claim to survive summary judgment where, among other things, the alleged failure to make repairs to an existing ramp could result in liability).

178. See Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 330 (2d Cir. 1995) (affirming preliminary injunction under the FHA that required defendants to give complainant, who had multiple sclerosis, a parking space on the ground floor of the building's parking garage); *Reyes*, 661 F. Supp. 2d at 262 (denying motion to dismiss plaintiff's reasonable accommodation claims, under the FHA and NYSHRL, based on defendants' alleged "practice of keeping the driveways and parking lot in a state of disrepair and…policy regarding [allocating] parking spaces"); Hubbard v. Samson Mgmt. Corp., 994 F. Supp. 187, 188, 191-932 (S.D.N.Y. 1998) (granting summary judgment for plaintiff after concluding that "a free, reserved parking space near her apartment is a reasonable accommodation required by the Fair Housing Act").

179. See DiNapoli v. DPA Wallace Ave II, LLC, No. 07 Civ. 1409(PAC), 2009 U.S. Dist. LEXIS 23274, at *12-19 (S.D.N.Y. Mar. 23, 2009) (denying defendant's motion to dismiss tenant's request for a reasonable accommodation, under the FHA, to grant him access to the building's elevator from 5:00 p.m. to 8:00 a.m.); Prince Mgmt. Corp. v. Varela, N.Y. L.J., July 29, 1998, at 22, col. 5 (Sup. Ct. New York County) (affirming grant of injunctive relief and $70,000 in compensation for mental anguish based on management company's refusal to grant tenant's request for access to the building's elevator from 5:00 p.m. to 8:00 a.m. in violation of the NYCHRL).

180. *See* United States v. Freer, 864 F. Supp. 324, 326 (W.D.N.Y. 1994) (granting an injunction under the FHA to install a wheelchair ramp); Comm'n on Human Rights ex rel. Raymond v. 325 Coop. Inc., No. 1432/98 (N.Y.C. Commission Human Rights Jan. 12, 1999), 1999 WL 152526, at *1-2 (Comm'n Hum. Rts. Jan. 12, 1999) (requiring respondents to build a ramp, install door openers on the elevator doors and on the lobby door, and pay the complainant $15,000 in compensatory damages); In re T.K. Mgmt., Inc. v. Gatling, Index No. 14255/05, at 11-14 N.Y. L.J., Nov. 2, 2005, at 19, col. 3 (Sup. Ct. Queens County Oct. 19, 2005) (unpublished opinion) (denying request to annul New York City Commission on Human Rights' rejection of undue hardship burden defense in requiring petitioners to install a ramp, widen doors and install a lift in the lobby of the subject premises).

181. *See Using Reasonable Accommodations to Prevent Eviction*, *supra* note 139 ("The tenant might also ask that the landlord allow him to enter and exit the building through a rear door that is normally reserved for staff, so that the tenant is able to avoid a high traffic entrance area where other tenants congregate and are likely to engage him in conversation that could lead to a confrontation.").

182. *See, e.g.*, Hirschmann v. Hassapoyannes, 52 A.D.3d 221, 221, 859 N.Y.S.2d 150, 151-52 (1st Dep't 2008) (affirming grant of summary judgment under FHA, NYSHRL, and NYCHRL based on defendants' revocation of approval of a purchaser of a co-op after he requested permission to install a washer and dryer based on his incontinence that resulted from bowel surgery); Starret City, Inc. v. Adamson, N.Y. L.J., Apr. 12, 1995, at 30, col. 5 (Civ. Ct. Kings County) (refusing to evict tenant for the installation of a freezer after finding that the freezer was a reasonable accommodation because "a 'panic disorder'…prevent[ed] her from shopping for food for her family").

183. *Removing Barriers: Project Open House*, Mayor's Office for People with Disabilities, *available at* http://www.nyc.gov/html/rwg/mopd/html/housing_rbpho.html (last visited Sept. 4, 2010).

184. *See* Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp. 2d 341, 343, 347 (E.D.N.Y. 2005) (denying landlord's motion to dismiss the request, under the FHA, of a tenant with a disability who lived on fourth floor of rent-stabilized walk-up apartment building, to move to vacant first-floor apartment for same amount of rent); Liddy v. Cisneros, 823 F. Supp. 164, 173 (S.D.N.Y. 1993) (denying defendant's motion to dismiss and for summary judgment as to plaintiffs' challenge, under the FHA and Rehabilitation Act, of an alleged HUD policy that denied transfers to handicapped-accessible, federally subsidized housing to applicants already residing in subsidized units). In a recently filed federal complaint, a mother and her adult daughter, who has muscular dystrophy, allege that their landlord violated the FHA, NYSHRL, and NYCHRL by failing to grant their request for a reasonable accommodation that would have allowed them to relocate from their apartment on the fourth floor to a vacant apartment on the building's first floor; *see also* Complaint, Flores v. 243-249 13th St. Investor, LLC, No. 1:2009cv05593 (E.D. N.Y. Dec. 22, 2009).

185. *Cf.* King v. Menachem, 113 Misc. 2d 63, 66, 450 N.Y.S.2d 933, 936 (Sup. Ct. App. T. 2d Dep't 2d & 11th Jud. Dists. 1981) (affirming dismissal of a holdover petition after concluding that the full-time health-care aide was a service to the tenant and not an "occupant" and therefore did not materially breach the tenancy).

186. *See* Marks, 2002 WL 764473, at *7 (holding that defendant did not violate the FHA because "Plaintiff's request for a roommate had nothing to do with her sickness and, from all that appears, everything to do with her pocketbook").

187. *See* Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 301-02 (2d Cir. 1998) (affirming dismissal of plaintiffs' claim based on their landlord's refusal to accept their Section 8 vouchers as a reasonable accommodation for their disabilities because "the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps"). *But see* Giebeler v. M & B Assocs., 343 F.3d 1143, 1159 (9th Cir. 2003) (reversing district court's grant of summary judgment for the defendants because a prospective tenant's "request that his financially qualified mother be allowed to rent an apartment for him to live in, affording him the opportunity to live in a suitable dwelling despite his disability, was a request for a reasonable accommodation within the intendment of the FHAA"); Freeland v. Sisao LLC, No. CV-07-3741, 2008 U.S. Dist. LEXIS 26184, at *14-16 (E.D. N.Y. Apr. 1, 2008) (denying in part defendants' motion to dismiss because "plaintiff has alleged sufficient facts in support of a plausible claim that acceptance of the Section 8 voucher was a reasonable accommodation of her disability that prevented her from working and earning an income").

188. *See, e.g.*, Salute, 136 F.3d at 301-302; Freeland, 2008 U.S. Dist. LEXIS 26184, at *4-6.

189. New York, N.Y., ADMIN CODE tit. 8, ch. 1, § 8-102(25) (LEXIS through 2009); *see id.* § 8-101.

190. *See* Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 124-25, 802 N.E.2d 135, 140, 769 N.Y.S.2d 785, 790 (2003).

191. *See, e.g.*, 169 Realty LLC v. Wolcott, N.Y. L.J., Apr. 22, 2002, at 29, col. 3 (Civ. Ct. Kings County) (noting that a stay might be appropriate under R.P.A.P.L. § 753(4) to give a respondent an opportunity to cure the alleged nuisance). Nuisance proceedings based on hoarding are often called "Collyer's cases." *See also* Franz Lidz, *The Paper Chase*, N.Y. TIMES (Oct. 26, 2003), *available at* http://www.nytimes.com/2003/10/26/nyregion/the-paper-chase.html?pagewanted=all (last visited Sept. 4, 2010).

192. Sanjaya Saxena, Editorial, *Is Compulsive Hoarding a Genetically and Neurobiologically Discrete Syndrome? Implications for Diagnostic Classification*, 164 AM. J. PSYCHIATRY 380 (Mar. 2007) (arguing that "the available evidence argues strongly against this classification").

193. N.Y.C.R.R. tit. 9, ch. VIII, §§ 2204.2(a)(1), 2524.3(a). For a recent case, *see* Cabrini Terrace Joint Venture v. O'Brien, 71 A.D.3d 485, 486, 896 N.Y.S.2d 339, 339 (1st Dep't 2010) (finding that "[a] posttrial opportunity to cure was properly denied upon a finding, based on the testimony and the trial court's own inspection, that the nuisance conditions had existed over a substantial period, had not abated although tenant had been given ample opportunity to do so, and were unlikely to be abated").

194. *See, e.g.*, RCG-UA Glenwood, LLC v. Young, 9 Misc. 3d 25, 26, 801 N.Y.S.2d 481, 481-82 (App. T. 2d Dep't 9th & 10th Jud. Dists. 2005) (affirming the dismissal of a nuisance holdover based on "clutter conditions in the apartment" because "[w]hile the FHAA does not require a landlord to abide conduct constituting a nuisance, it does, in the circumstances presented, require that tenant be accommodated to the extent of being afforded an opportunity to continue to reside in the apartment" and receive assistance from a treatment program).

195. *Id*.

196. *See* 506-508 Holding Corp. v. Glatzel, Index No. 58754/05, at *5-9 (Civ. Ct. Queens County 2006) (unpublished opinion) (citing a recent adjustment of respondent's medications and his reasonable accommodation request under the FHA in granting a stay of the warrant of eviction); 301 E. 69th St. Assocs. v. Eskin, N.Y. L.J., Nov. 24, 1993, at 24, col. 2 (Civ. Ct. New York County), WL 11/13/1993 N.Y. L.J. 24, (col.2) (modifying court's prior judgment to allow a post-judgment cure of a nuisance based on new evidence that a change in medication had led to a change in respondent's behavior); 1021-27 Ave. St. John Hous. Dev. Fund Corp. v. Hernandez, 154 Misc. 2d 141, 146-48, 584 N.Y.S.2d 990, 994 (Civ. Ct. Bronx County 1992) (staying execution of final judgment of possession to permit tenant to obtain psychiatric treatment and to disengage himself from illegal drug use and sales in subject premises); Hertwig-Brilliant v. Michetti, N.Y. L.J., Nov. 9, 1993, at 26, col. 1 (Civ. Ct. N.Y. County) (remanding case to DHPD for further consideration after concluding that petitioner should be given the "opportunity to demonstrate that he can continue to reside at his apartment without posing a threat or danger to others or otherwise engaging in acts or behavior constituting a nuisance to those who come in contact with him at his development" based on the "affirmative duty to accommodate to the special problems of the mentally disabled so that they may be able to live within the general population" set forth in city, state, and federal statutes that prohibit housing discrimination based on disability); *see also* Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1126-27 (D.C. 2005) (holding that "the tenant's request for a brief stay of the eviction proceeding" to allow time for her apartment to be cleaned is a reasonable accommodation under the FHA).

197. Similarly, a person with a disability may request that other public entities, such as NYCHA, make reasonable accommodations to their general procedures; *see* Blatch v. Hernandez, No. 97-Civ-3918, 2008 U.S. Dist. LEXIS 92984, at *4 (S.D. N.Y. Nov. 3, 2008). *But see Gray*, 22 Misc. 3d at 683-85, 868 N.Y.S.2d at 504-05 (denying a NYCHA tenant's request that a four-month statute of limitations be extended based on her mental disability).

198. *See* Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 110 (2000) "Surely one of the most stressful emotional aspects of a lawsuit is when the client testifies at trial or has his or her deposition taken by the adverse party. The courtroom is a public place, and testimony is taken from the witness stand in the presence of a variety of strangers and enemies…. Playing such a key speaking role on center stage in the courtroom can thus be a nightmare for many clients. Even depositions, which typically are taken in a lawyer's office, will nonetheless be taken in front of strangers such as the court reporter and also the adversarial parties in the lawsuit and their attorneys.").

199. *See* Starret City, Inc. v. Adamson, N.Y.L.J., Apr. 12, 1995, at 30, col. 5 (Civ. Ct. Kings County) ("During her testimony the court observed her considerable distress and granted her request to have her psychiatrist stand near the witness box to lend emotional support.").

200. ADA FAQS, *supra* note 115.

201. Broadway Inwood Realty Inc. v. Belkys Abreu, Index No. 93686/2001, at 1 (Civ. Ct. N.Y. County 2002) (unpublished opinion).

202. *See* Goldman et al. v. Eggers, No. L&T 64884/2001, at 2 (Civ. Ct. N. Y. County 2001) (unpublished opinion) (ordering that "discovery in this case [shall] proceed with the production of documents and then with interrogatories rather than an oral deposition" based on evidence of respondent's medical condition).

203. *See, e.g.*, DiPasquale v. Milin, 303 F. Supp. 2d 430, 431 (S.D.N.Y. 2004) (alleging that "a judge of the Civil Court of the City

of New York, Housing Part (the 'Housing Court'), violated [plaintiff's] rights under the [ADA] by failing to acknowledge [plaintiff's] disabilities when rendering decisions in an ongoing action in the Housing Court to which [plaintiff] is a party"); Weissbrod v. Hous. Pt., 293 F. Supp. 2d 349, 350-51 (S.D.N.Y. 2003).

204. U.S. Access Board, *About the U.S. Access Board*, *available at* http://www.access-board.gov/about.htm (last visited Sept. 4, 2010) (describing the "Mission" of the U.S. Access Board, which is a "Federal Agency Committed to Accessible Design").

205. *See generally* U.S. Access Board, Courthouse Access Advisory Committee, *Justice for All: Designing Accessible Courthouses* (Nov. 15, 2006), *available at* http://www.access-board.gov/caac/report.pdf (last visited Sept. 4, 2010).

206. Norman L. Reimer, *Foreword*, in N.Y. County Lawyers' Ass'n, Report: The New York City Housing Court in the 21st Century: Can it Better Address the Problems Before It? (2005), *available at* http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf (last visited Sept. 4, 2001).

207. *Id.*

208. Zelhof et al., *supra* note 106.

209. *See id.* at 755-56 ("[I]dentifying litigants with diminished capacity at the earliest possible stage of the proceeding will allow the court to offer appropriate accommodations or protections before the case is adjudicated.")

210. *See id.* at 767-69.

211. *See Housing Court in the 21st Century*, *supra* note 9, at 608-09.

212. *Id.* at 636.

213. Zelhof et al., *supra* note 106, at 770-71.

214. *See id.* at 771-72.

215. *Id.* at 771. In 2007, Washington state implemented a court rule that provides that "counsel may be appointed as a reasonable accommodation for a litigant with a disability." Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 Touro L. Rev. 31, 62 (2009) (citing Wash. Ct. R. Ann. G.R. 33 (2008)).

216. *See Housing Court in the 21st Century*, *supra* note 9, at 622-33 n.178.

217. *Id.* at 638.

218. *Id.*

219. New York County Lawyers' Ass'n, 2005 Justice Ctr. Programs (2005 Programs), *available at* http://www.nycla.org/siteFiles/sitePages/sitePages288_2.pdf (last visited Sept. 4, 2010).

220. *December 2007 Newsletter*, N.Y. City Department for the Aging (December 2007), *available at* http://www.nyc.gov/html/dfta/html/newsletters/newsletter-dec07.htm (last visited Sept. 4, 2010).

221. *Id.*

222. *Id.*

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# Will the Issue of "Standing" (or the Lack Thereof) Impact Commercial Foreclosures?

By Marvin N. Bagwell

Readers of *The New York Times*, *The Wall Street Journal*, *Crain's*, *Barron's* or any of the well-known and often-quoted business and financial publications are aware that many of the commercial projects that closed in New York during the good old days of 2004-2008 are now in trouble.[1] This project is "underwater"; the owners are about to "lose" that building; that high rise being turned over to the "servicers"; the owners of the so-and-so luxury condominium "missed" their mortgage payment, and on and on and on.[2] The question that many of us looking from the outside in and reading versions of the foregoing headlines have been asking ourselves is, "Why have so few of these projects gone into foreclosure?" Or better put, "Why hasn't the lender called my firm to file a foreclosure complaint or to defend against one?" Shouldn't the Manhattan Supreme's inbox be filled with commercial foreclosure filings? In other words, the newspapers and websites are filled with statistics regarding the seemingly unending news about residential foreclosures. So why are we not seeing the same stories about the number of foreclosure complaints filed against commercial properties?

There are several answers to this question. The commercial marketplace trails the residential and only now, two years into the foreclosure crisis, are the foreclosure actions commencing.[3] Rumor has it that certain mezzanine lenders are purchasing some of the mortgages to save their investments.[4] Other projects are being taken over by servicers and are in the process of being "worked-out."[5] And in some cases, developers and sponsors are simply turning their keys over to the lenders.[6] However, there is another answer which is only now beginning to be whispered in the corridors of legal power and in seminars where the experienced counsel those who are about to go into battle.

Many counsels who are not yet battle scarred from high-level financial litigation browse the pages of the *New York Law Journal* and tsk-tsk the recent developments in the evolution of residential foreclosure law. Invoking the sanctity of contracts, they ask themselves, "How can a court do that? Imagine, setting aside a mortgage merely because the bank lost some of the paperwork!" The more experienced lawyers look at these cases and are scared to death.

*"[T]he newspapers and websites are filled with statistics regarding the seemingly unending news about residential foreclosures. So why are we not seeing the same stories about the number of foreclosure complaints filed against commercial properties?"*

Those attorneys shutter at the prospect that the precedent being set on the residential side may be followed when commercial mortgages go into foreclosure as well.[7] As the public is well aware, many of the commercial mortgages were securitized and sold either as bonds or derivatives to unsuspecting investors worldwide.[8] Where is the paperwork for those loans? How does one foreclose on a building whose mortgage has been sliced and diced and, combined with mortgages from tens of other structures and where parts of the mortgage all of which found their way into who knows how many collateralized debt obligations (CDOs), collateralized mortgage obligations (CMOs) or credit default swaps? Can we even find the structure investment vehicle (SIV) that took out the mortgage? Therefore, as a public service to those who are considering foreclosing on a commercial mortgage, here is an update on the residential foreclosure case law. What follows is a brief and, due to space considerations and our younger readers' attention span (or lack thereof)—or if you are like me, daily jousts with the onset of approaching senility—simplistic outline of the issues to which the courts are paying attention.

Let us start with the issue of standing. To initiate a foreclosure action, the lender must have standing to sue.[9] Without standing, the plaintiff lender may not proceed with the action.[10] "Since standing to sue is jurisdictional and goes to a court's authority to resolve litigation, the [court] can raise this matter sua sponte."[11] Translated, if the court does not think that the lender has standing, the court, on its own motion, can, and as we shall see often does, dismiss the lender's foreclosure action.[12]

Standing in the context of a foreclosure action means essentially that the lender must own the mortgage that it is attempting to foreclose.[13] The leading case on this point is the often-quoted *Kluge v. Fugazy*, where the Second Department's Appellate Division wrote, "Foreclosure of a mortgage may not be brought by one who has no title to it."[14]

The issue of the lender's ownership of the mortgage in foreclosure most often comes up in cases involving the assignment of the mortgage in question.[15] In the residential context, it became very clear early in the subprime crisis that the proper assignment of mortgages and the recording of those assignments in the public records were not among

lenders' priorities.[16] Gretchen Morgenson, financial reporter for *The New York Times*, wrote that one of the sources she interviewed said: "Bookkeeping is such a bore, especially when there are billions to be made, shoveling loans into trust like coal into the Titanic's boilers…[w]ho's going to ask for proof of ownership of these notes anyhow?"[17] It turns out that the judges presiding over foreclosure actions are now asking for proof of ownership.[18] Importantly, standing requires that the lender own the mortgage at the time the lender brings the foreclosure action, which in New York means when the lender files a notice of pendency.[19]

In *Aurora Loan Services v. Grant*, Aurora Loan Services ("Aurora") filed its notice of pendency on November 21, 2006.[20] However, Aurora was not assigned the mortgage until November 29, 2006.[21] Justice Rothenberg of Kings County dismissed the foreclosure complaint and vacated the notice of pendency.[22] In *Deutsche Bank National Trust Co. v. Stevens*, Justice Lewis of Kings County dismissed Deutsche Bank's foreclosure action when it commenced the action on June 2, 2008, but did not receive its assignment from Fremont Investment & Loan until June 11, 2008.[23] In *Wells Fargo Bank, N.A. v. Burke*, Wells Fargo commenced the first of three foreclosure actions on June 14, 2002.[24] Wells Fargo did not receive its assignment of the mortgage until July 22, 2009.[25] Justice Silber of Kings County denied the defendant's pre-answer motion to dismiss "on the grounds that the Statute of Limitations ran prior to commencement of the action."[26] Even though Wells Fargo lacked standing to bring the foreclosure action in 2002, the court also ruled that the six-year statue of limitations which governs foreclosure actions had also run as against some of the payments due under the mortgage.[27] It is therefore clear, as the court stated in *Deutsche Bank National Trust Co. v. Stevens*, that "an assignee of such a mortgage does not have standing to foreclose unless the assignment is complete at the time the action is commenced."[28]

In regard to assignments of mortgages, matters become more and not less complicated. The traps for the unwary lender's attorney as well as the opportunities for the astute borrower's counsel are myriad.

Commencing the foreclosure action and then back-dating (whoops, sorry, changing the effective date of the assignment) will not work and might just try the court's patience. In *Wells Fargo Bank, N.A. v. Marchione*, Wells Fargo commenced its foreclosure action on November 30, 2007.[29] Option One Mortgage Corporation assigned the mortgage in foreclosure to Wells Fargo on December 4, 2007 with a provision that the assignment became effective on October 28, 2007.[30] Justice Leventhal, writing for the Appellate Division, Second Department, dismissed Wells Fargo's complaint for lack of standing, ruling that the assignment must be complete at the time the action is commenced.[31] Put another way, the assignment of the mortgage must have occurred prior to the commencement of the foreclosure action, which is the notice of pendency filing date.[32]

On Staten Island, on a motion for reconsideration, Justice Maltese reversed himself and dismissed a foreclosure action because the foreclosing plaintiff lacked standing at the time it commenced the instant action.[33] In *Deutsche Bank National Trust Co. v. Abbate*, the lender commenced its foreclosure action on March 1, 2007.[34] The mortgage was assigned to plaintiff Deutsche Bank on March 7, 2007.[35] The assignment contained a clause stating that the effective date of the assignment was retroactively effective to February 28, 2007.[36] Justice Maltese held that the court should have dismissed the action for lack of jurisdiction and he promptly did so, holding that "absent a physical or written transfer before the filing of a complaint, retroactive assignments are invalid,"[37] and that the court "lacks jurisdiction over the subject matter when the plaintiff has no title to the mortgage at the time it commenced the action."[38]

It is also not a good idea, for the lender at least, to assign a mortgage during the pendency of action, especially in Justice Schack's court. In *Deutsche Bank National Trust Co. v. Castellanos*, Deutsche Bank commenced a foreclosure action on July 27, 2006.[39] Justice Schack discovered by going on the Automated City Register Information System (ACRIS), while he was preparing to issue a judgment of foreclosure and sale, that Deutsche Bank had assigned the mortgage to MTGLQ Investors, L.P., a subsidiary of Goldman Sachs, on January 19, 2007. The court had "no choice but to deny the application for a judgment of foreclosure and sale without prejudice. Plaintiff Deutsche Bank had no standing to proceed with this action since January 19, 2007."[40]

Some courts have served notice that they will not only conduct their own search on ACRIS, but heaven forbid, they will also examine assignment and related documents.[41] Justice Schack in *HSBC Bank USA N.A. v. Yeasmin* (it's time to give Deutsche Bank a break), found that the assignment from Mortgage Electronic Registration Systems (MERS), as nominee for Cambridge, to HSBC was invalid in that neither a corporate resolution nor a power of attorney was recorded with the assignment.[42] Further, the person who executed the assignment was an officer of both MERS and HSBC, a clear conflict of interest to Judge Schack. Also, Judge Schack, as he did in *Castellanos,* questioned why a lender would assign a non-performing loan. He held that the assignment, because of the lack of the corporate resolution and power of attorney, was invalid and that therefore, HSBC lacked standing to foreclose the instant mortgage.[43] Judge Schack, previously, found the same defect (lack of recorded board resolution or power of attorney) regarding the assignment from MERS to HSBC in *HSBC Bank USA N.A. v. Vasquez*.[44] He dismissed that foreclosure proceeding as well.

Judge Schack is not alone in examining the assignment closely. In *Bank of New York v. Alderazi*, MERS purported to assign the subject mortgage to Bank of New York by empowering an officer to execute the assignment by "Board Resolution and/or appointment."[45] However, the court found no proof of authority recorded with the assignment. Following Judge Schack's lead, and citing *Yeasmin*, Judge Saitta dismissed Bank of New York's foreclosure action.[46]

What happens when the original lender goes out of business or disappears and as result the mortgage cannot be assigned? The ingenious lender's counsel then tries to use the note to edge his or her way through foreclosure. Sometimes it works; sometimes it does not.

In *IndyMac Bank F.S.B. v. Garcia*, reading between the lines and having some street knowledge of these matters, we can presume that the original lender, Sterling National Mortgage Company, Inc. (Sterling National), can no longer be found to execute an assignment of the original mortgage.[47] However, Sterling National endorsed the note to IndyMac prior to the commencement of the foreclosure action. IndyMac's counsel submitted an affidavit to the court that the note with the proper endorsements was in the lender's hands, but the court noted that the plaintiff did not prove that it actually possessed the note. The court conceded that the mortgage followed the note and that if the lender could prove physical possession of the note, the lender would have standing to foreclose. However, here the endorsement on the note was not on the note itself but on a separate page. The lender was not able to convince Justice Mayer that it had actual possession of the note. Therefore, the court denied the plaintiff's motion for an order of reference.[48]

However, the lender sometimes wins on the note indorsement issue. In *Wells Fargo Bank, N.A v. Perry*, Wells Fargo alleged that it acquired ownership of the subject mortgage through an "allonge indorsement" of the mortgage note by Global Home Loan and Finance to Option One who, on the same day, endorsed the note to Wells Fargo.[49] Justice Whelan agreed with Wells Fargo, but it should be noted that the defendants defaulted and therefore did not put Wells Fargo to its proof.

There is one other matter of which the commercial foreclosure bar must become aware. If the holder of the commercial mortgage in foreclosure is a foreign limited liability company ("LLC"), i.e., does not hold a license to do business in New York, then, pursuant to Sections 802 & 808 of the Limited Liability Law, access to the courts of New York will be denied to the LLC.[50] In *Aries Financial, LLC v. 2729 Claflin Avenue, LLC*, Aries Financial sought to foreclose a mortgage given to it by Claflin.[51] Claflin argued that Aries could not foreclose because it did not have a license to do business in New York. Aries counter-argued that it was a foreign bank licensed to do business by the States of Alaska and Delaware and therefore was exempt from the LLC requirement. Also, Section 200 of the Banking Law permitted it as foreign bank to do business in New York without a New York license. The court, Justice Stinson, found that Aries did not meet the definition of a "bank" under the Banking Law and that contrary to its assertions, it was not licensed as such in either Alaska or Delaware. Therefore, the court denied Aries' motion for summary judgment and an order of reference.[52] The lesson is that if a Special Investment Vehicle (SIV) or a Special Purpose Vehicle (SPV), which was established as a non-New York LLC, holds the mortgage, it is incumbent upon counsel for the lender and the borrower to make sure that the lender has a license to do business in New York. Otherwise, the foreclosure will be delayed until compliance is obtained.

In all of the actions set forth above, the dismissals were without prejudice. That means the day after the rulings came down, the foreclosing lender was free to bring a new and timely action against the borrower. Why, as some counsels, mostly from the foreclosure bar, have wondered, waste all this time and judicial resources when the lender will simply commence another action? The borrower's bar will probably respond that the borrower is due his or her day in court and the lender should be required to prove its case before putting someone out from his or her home. The court's response was put most succinctly by Justice Leventhal in *Wells Fargo Bank, N.A. v. Marchione*: "Wells Fargo might have reached this conclusion earlier in its calculus to commence the lawsuit prior to the execution of the assignment."[53] In other words, those who live in glass houses.…

As Ms. Morgenson noted in her article and has become common knowledge these days even to the person on the street, Main as well as Wall, the securitization process where mortgages were sliced, diced and packaged into bonds was a "mess" in terms of documentation.[54] Is it possible that the lack of attention to detail may have occurred in the commercial securitization process as well? Given that commercial securities are much more complex than residential, I leave it to the reader to come up with your own answer to that question. However, if the law on the residential side is brought over to commercial foreclosures, senior partners had better prepare to send their junior associates scouring through warehouses and computer databases to find out who actually owns the mortgages which are about to go into foreclosure. And that ownership must be recorded in the public records.

If the pundits are correct, more and more of the commercial mortgages, which were bundled into commercial mortgage-backed securities ("CMBSs"), are about to go into default and possibly then into foreclosure.[55] We may soon see how much of the foreclosure law, especially as it relates to standing, will move over from the residential side to the commercial.

This article is not meant to be an exhaustive study of every reported case on standing. Certainly, there are probably many cases which may be reported and have not been cited in this article. Also, many issues have not received their due. For example, as between the parties to an assignment, whether the assignment is recorded before, during, or after a foreclosure action, may be irrelevant to the assignment's enforceability. However, if this article has caused anyone to think before leaping, then its cause has been served. And thinking is what separates the good lawyers from the not-so-good. Here's to being on the side of the thinking.

## Endnotes

1. *E.g.*, Floyd Norris, *Banks Stuck With Bill For Bad Loans*, N.Y. Times, August 19, 2010, at B1; Carrick Mollenkamp, *To Fix Sour Property Deals, Lenders 'Extend and Pretend'*, The Wall Street Journal, July 7, 2010; Theresa Agovino, *Gramercy Park Hotel Owners Default on Loan*, Crain's N.Y. Business, July 9, 2010.
2. Norris, *supra* note 1, at B1; *see also*, Mollenkamp, *supra* note 1, at 1; Agovino, *supra* note 1, at 1.
3. *See e.g.*, Mollenkamp, *supra* note 1, at 1; *see also*, Agovino, *supra* note 1, at 1.
4. Agovino, *supra* note 1, at 1.
5. *See e.g.*, Agovino, *supra* note 1, at 1; *see also*, Amanda Fung, *First Ave. Building Site Hits Market Via Loan Sale*, Crain's N.Y. Business, July 19, 2010, at 1; Binyamin Appelbaum, *Mortgage Role for U.S. is Affirmed*, N.Y. Times, August 17, 2010, at B1.
6. *See* Bob Tedeschi, *Mortgages: Seeking to Close off an Exit*, N.Y. Times, July 25, 2010, at RE5.
7. Richard S. Fries, Address at the N.Y. Bar Ass'n Real Property Section Annual Meeting (Jan. 28, 2010) (stating the possibility that the precedents being set in residential foreclosure law might affect the foreclosure of commercial properties).
8. *See* Gretchen Morgenson, *Fair Game: Seeing vs. Doing*, N.Y. Times, July 25, 2010, at BU1.
9. *See* JP Morgan Chase Bank, N.A. v. George, No. 10865/06, 2010 N.Y. Misc. LEXIS 943, at *6 (Sup. Ct. New York County May 4, 2010).
10. *Id.* at *4 ("If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action." (citation omitted)); *see also* Stark v. Goldberg, 297 A.D.2d 203, 204, 746 N.Y.S.2d 280, 281, 2002 N.Y. Slip Op. 06091 (1st Dep't 2002).
11. Axelrod v. N.Y. State Teachers Ret. Sys., 154 A.D.2d 827, 827, 546 N.Y.S.2d 489, 490 (3d Dep't 1989). For a discussion of standing in the mortgage foreclosure context, see Justice Schack's decision in *HSBC Bank USA v. Yeasmin*, No. 341242/07, 2008 WL 1915130, at *2 (Sup. Ct. Kings County May 2, 2008).
12. For discussions regarding standing in earlier foreclosure cases, see Suzanne M. Garcia, *A New Perspective on Foreclosure in Title*, N.Y. L.J., Aug. 25, 2008, at 4, col. 1; *see also* Marvin N. Bagwell, *Judges Take Notice of Subprime Mortgage Crisis*, 22 No. 6 N.Y. Real Est. Rep. 1 (2008).
13. *See* Campaign v. Barba, 23 A.D.3d 327, 327, 805 N.Y.S.2d 86, 86 (2d Dep't 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment.").
14. Kluge v. Fugazy, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92, 92 (2d Dep't 1998); *see also* Manne v. Carlson, 49 A.D. 276, 278, 63 N.Y.S.162, 162 (1st Dep't 1900).
15. *See* Gretchen Morgenson, *Guess What Got Lost in the Loan Pool?*, N.Y. Times, Mar. 1, 2009, at BU1 (reporting that judges in California and Florida are beginning to seek proof of ownership of mortgage notes in foreclosure proceedings).
16. *See id.*
17. *Id.*
18. *See infra*, notes 19-27.
19. *See* Fed. Nat'l Mortgage Ass'n v. Youkelsone, 303 A.D.2d 546, 546-47, 755 N.Y.S.2d 730, 730 (3d Dep't 2003) (holding that when plaintiff has standing to sue when he is assignee of the mortgage and the underlying note at the time the foreclosure action was commenced); see also, LaSalle Nat'l Ass'n v. Ahearn, 49 A.D.3d 911, 912-13, 975 N.Y.S.2d 595, 597 (3d Dep't 2009) (holding defendant failed to demonstrate standing when assignment of note and mortgage was dated subsequent to commencement of the foreclosure proceeding against mortgagor).
20. Aurora Loan Servs. v. Grant, No. 35680/06, 2007 WL 2768915 (N.Y.Sup.), at 2 (Sup. Ct. Kings County Aug. 29, 2007).
21. *Id.*
22. *Id.* at *3.
23. Deutsche Bank Nat'l Trust Co. v. Stevens, No. 115862/08, 2010 N.Y. Misc. LEXIS 1103, at *1-2 (Sup. Ct. Kings County May 18, 2010).
24. Wells Fargo Bank, N.A. v. Burke, No. 25077/09, 2010 N.Y. Misc. LEXIS 133, at ***2 (Sup. Ct. Kings County Feb. 1, 2010).
25. *Id.*
26. *Id.* at 1-5.
27. *Id.* at 4. *See also* N.Y. L.J., Feb. 10, 2010, at 27, col.1 (Sup. Ct. Kings County Feb. 1, 2010).
28. No. 15862/08, 2010 N.Y. Misc. LEXIS 1103, at *2 (Sup. Ct. Kings County May 18, 2010); *see also* Wells Fargo Bank, N.A. v. Marchione, No. 2008-02775, 2009 N.Y. Slip Op 7624 at *2 (App. Div. 2d Dep't Oct. 20, 2009); LaSalle Bank Nat'l Ass'n v. Ahearn, 59 A.D.2d 911, 912, 875 N.Y.S.2d 595, 597 (3d Dep't 2009).
29. *See Marchione*, 2009 N.Y. Slip Op 7624, at *1.
30. *Id.*
31. *Id.* at *3-4.
32. *Id.* at *3.
33. Deutsche Bank Nat'l Trust Co. v. Abbate, 901 N.Y.S.2d 905, 905, 2009 N.Y. Slip Op 52154U, at *5 (Sup. Ct. Richmond County Oct. 6, 2009).
34. *Id.* at *1-2.
35. *Id.* at *2.
36. *Id.*
37. *Id.* at 2-3.
38. *Id.* at 5. *See also* N.Y. L.J., Oct. 26, 2009, at 20, col. 1 (Sup. Ct. Richmond County Oct. 6, 2009).
39. Deutsche Bank, Nat'l Trust Co. v. Castellanos, No. 22375/06, 2007 N.Y. Misc. LEXIS 3394, at *4 (Sup. Ct. Kings County May 11, 2007).
40. *Id.* at *5.
41. *See* EMC Mort. Corp. v. Batista, No. 34145/06, 2007 WL 1599986 (N.Y.Sup.), at *4 (Sup. Ct. Kings County June 5, 2007) (holding that plaintiff lacked standing to foreclose on defendant's mortgage because plaintiff failed to present proper power of attorney documentation relating to the assignment of the defendant's mortgage).
42. HSBC Bank USA, N.A. v. Yeasmin, No. 34142/07, 2008 N.Y. Misc. LEXIS 2585, at *3 (Sup. Ct. Kings County May 2, 2008).
43. *Id.* at 20-3.
44. HSBC Bank USA, N.A. v. Vasquez, No. 37410/07, 2009 WL 2581672 (N.Y.Sup.), at *3 (Sup. Ct. Kings County Aug. 21 2009); N.Y. L.J., Aug. 28, 2009, at 28, col. 3 (Sup. Ct. Kings County Aug. 21, 2009).
45. Bank of New York v. Alderazi, 28 Misc. 3d 376, 376, 900 N.Y.S.2d 821, 822-23 (Sup. Ct. Kings County 2010).
46. *Id.* at 376.
47. *See* IndyMac Bank F.S.B. v. Garcia, No. 7282-2008, 2010 WL 2606498 (N.Y.Sup.), at *1-2 (Sup. Ct. Suffolk County June 22, 2010) (explaining the multiple deficiencies concerning Sterling National's purported indorsement of the note to plaintiff, prior to commencement of the instant action).

48. *Id.* at 3. *See also* N.Y. L.J., July 7, 2010, at 27, col. 1 (Sup. Ct. Suffolk County June 22, 2010).

49. Wells Fargo Bank, NA v. Perry, 23 Misc. 3d 827, 829, 875 N.Y.S.2d 853, 856 (Sup. Ct. Suffolk County 2009).

50. *See* N.Y. LTD. LIAB. CO. LAW §§ 802, 808(a) (McKinney 2006).

51. Aries Financial, LLC v. 2729 Claflin Avenue, LLC, No. 381809/2008, 2010 WL 932753 (N.Y.Sup), at *1 (Sup. Ct. Bronx County Jan. 26, 2010).

52. *Id.* at *5. *See also* N.Y. L.J., Feb. 10, 2010, at 26, col. 3 (Sup. Ct. Bronx County Jan. 26, 2010).

53. Wells Fargo Bank, N.A. v. Marchione, 69 A.D.3d 204, 210, 887 N.Y.S.2d 615, 615 (App. Div. 2d Dep't 2009).

54. *See* Morgenson, *supra* note 15.

55. Lingling Wei, *For CMBS, 'Worst Is Yet to Come,'* THE WALL STREET JOURNAL, June 2, 2010, at C6.

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**The author would like to credit Richard S. Fries, a member of Bingham McCutheon of New York City and an expert on financial workouts, who, in his presentation at the Real Property Section's 132nd Annual Meeting held at the New York Hilton on January 28, 2010, became one of the first counsels to suggest that the precedents being set in residential foreclosure law might affect the foreclosure of commercial properties.**

**Editors' note:** Since the submission of this article to the editors, three major lenders, GMAC (now Ally Bank), Bank of America and JP Morgan Chase, have suspended their residential foreclosure actions to amend the improper paperwork, which had been submitted to the courts. *See* David Streitfeld, *3rd Lender Will Freeze Foreclosures in the Courts,* N.Y. TIMES, October 2, 2010, at B1. Undoubtedly, this development has not gone unnoticed by the commercial borrowers' bar nor by the lenders' bar.

# Bergman on Mortgage Foreclosures: Can the Mortgagee Take a Check After Acceleration?

By Bruce J. Bergman

This continues to be one of the genuinely thorny and confusing issues for mortgage holders, although another case in New York offers clarification and answers the question "yes." But it needs some exploration.

First, let's not confuse this issue with accepting payment after sending the breach/cure letter so typically required in residential foreclosures and in more than a few commercial cases as well. As a reminder, if a borrower responds to a breach letter by sending less than all the past due sums, the mortgagee can accept the payment because it does not cure the default.

The instance of acceleration, however, is somewhat different. Recall that acceleration is an act which occurs only *after* the breach letter has been sent and the cure period has expired. (This assumes that a breach letter is required by the mortgage documents. Absent such a clause in the mortgage, in New York there is no obligation to send a cure letter as a prerequisite to acceleration.) Once an acceleration has been declared, what the mortgagee in essence has said to the borrower is that "we require that you pay the full amount of the mortgage (which would have come due 10 or 15 or 20 or 30 years from now) and we will not accept periodic installments as we had in the past."

After acceleration, law in New York provides that anything inconsistent with that declaration could be a waiver. So, is it inconsistent to accept some payments after acceleration (assuming those payments do not cure the default)?

Lenders have understandably been wary about taking such payments lest it give rise to a waiver. Perhaps the most practical problem is that a borrower could argue that the reason partial payments were sent (and accepted) was because an arrangement had been made with the lender to accept this and forgo foreclosure. While the lender would counter that no such understanding ever arose, courts could be sympathetic to borrowers asserting this argument and, absent clear written proof that there was never such an agreement, it could be surmised that there would be some jeopardy to the mortgage holder.

On the other hand, some lenders welcome receipt of sums of money (representing considerable amounts across a broad portfolio of loans), willing to take the occasional protest (and possible loss) when a wily borrower makes the argument.

But the legal answer to the question posed is, no, post-acceleration acceptance of a sum which doesn't cure all arrears should not give rise to a defense to continuation of the foreclosure. [This was recited in a New York case in 1997, *CME Group Ltd. v. Cellini*, 173 Misc.2d 404, 661 N.Y.S.2d 740 (1997).] And a more recent case bolsters that position, ruling that acceptance of additional payments towards a mortgage after default and acceleration is *not* inconsistent with the mortgage holder's insistence that the entire debt immediately be paid. [*Lavin v. Elmakiss*, 302 A.D.2d 638, 754, N.Y.S.2d 741 (3d Dept. 2003)].

So, whether a mortgagee will choose to accept post-acceleration checks is a *business* decision. As far as the law is concerned in New York, taking those checks is not a waiver.

**Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2009), is a partner with Berkman, Henoch, Peterson & Peddy, P.C. in Garden City, New York, a member of the USFN and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is also a member of the American College of Real Estate Lawyers and the American College of Mortgage Attorneys.**

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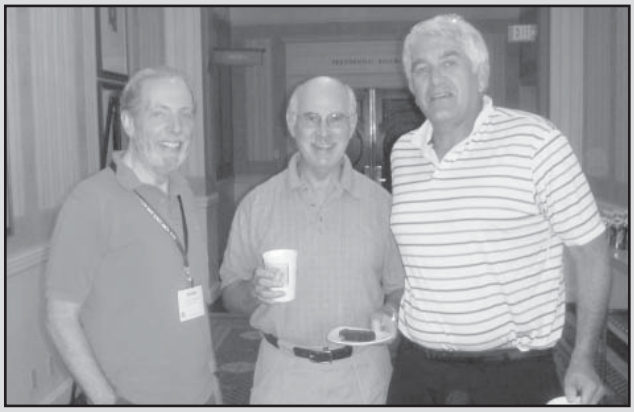




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This *Journal* is published for members of the Real Property Law Section of the New York State Bar Association.


ISSN 1530-3918 (print) ISSN 1933-8465 (online)

**Cite as: *N.Y. Real Prop. L.J.***

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