

UNSETTLED TIMES MAKE WELL-SETTLED LAW: RECENT
DEVELOPMENTS IN NEW YORK STATE'S RESIDENTIAL
MORTGAGE FORECLOSURE STATUTES AND CASE LAW

*Mark C. Dillon**

ABSTRACT

The New York State and national housing markets crashed in 2008. Difficulties in the New York State housing market have continued since then, as housing values are depressed and, in many instances, mortgages on homes exceed the value of the homes themselves. Many homeowners have defaulted on their mortgages, and the number of mortgage foreclosure actions filed in state court has increased, creating a need and an opportunity for procedural certainty and clarity.

To respond to the residential mortgage foreclosure "crisis," the State of New York enacted and amended a coordinated series of statutes designed to protect homeowners facing foreclosure on their homes in 2008, 2009, 2010, and 2011, in a public policy effort of maintaining as many families in their homes as possible. The statutes at issue include Real Property Law ("RPL") section 265-a, Banking Law sections 6-l and 6-m, Real Property Actions and Proceedings Law ("RPAPL") sections 1303 and 1304, and Civil Practice Laws and Rule ("CPLR") section 3408.

To date, provisions of most of these statutes have required interpretation by courts at both the trial and appellate level. There is now a body of appellate case law addressing issues of first impression regarding the meaning and operation of these homeowner protection statutes. This article summarizes the state

* Mark C. Dillon (B.A. Colgate Univ., M.A. N.Y.U., J.D. Fordham Law School) is an Associate Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department. He is also an Adjunct Professor of New York Practice at Fordham Law School where he was voted by the school's student body Adjunct Professor of the Year in 2009. This article was prepared in conjunction with law seminars that were jointly conducted by the Appellate Division in the First and Second Departments on April 25, 2012 in Brooklyn, New York.

of residential foreclosure law in New York State today, including its new homeowner protection laws and the cases that have interpreted them.

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Unsettled times make well-settled law.

There have been significant recent developments in New York State statutes and appellate decisional authority with regard to New York's law on residential mortgage foreclosures.¹ The statutes, mostly enacted in 2008 as a result of difficulties experienced in the New York State housing market, require a measure of judicial interpretation.² Cases affording the opportunity for interpretation have begun reaching the appellate courts. This article seeks to summarize those developments, as particularly reflected by several opinions rendered by the Appellate Division, Second Department.

The major developments in residential mortgage foreclosure law have centered in the areas of standing, pleading requirements,

¹ See discussion *infra* Parts I–VIII.

² See N.Y. C.P.L.R. 3211, 3408 (McKinney 2013); N.Y. BANKING LAW §§ 6-l, 6-m (McKinney 2013); N.Y. REAL PROP. LAW § 265-a (McKinney 2013); N.Y. REAL PROP. ACTS. LAW §§ 1303, 1304 (McKinney 2013).

court procedures, and consumer protections as reflected by the constituent statutes of the Home Equity Theft Protection Act (“HETPA”), and court procedures, each of which will be discussed here.³ The intention of this article is not to advocate for any position on the current statutory and decisional law, but to instead provide a snapshot of where residential mortgage foreclosure law stands at this time. This is, after all, a period of significant litigation activity prompted by both the decline of New York’s housing market and statutes enacted by the state legislature to address the foreclosure crisis.⁴

The reader may notice that almost all of reported cases that are discussed in this article originate from the Second Department. The reason is not that particular emphasis is being placed upon the decisions of that court, and reveals no bias on the part of the author. Rather, the numerosity of Second Department cases merely reflects the geographic area of the state in which the majority of residential mortgage foreclosure litigations arise.⁵ The First Department, comprised of New York County and Bronx County, likely sees a greater percentage of its foreclosure litigation in the commercial, rather than residential, context.⁶ Moreover, the First Department covers metropolitan counties within the state that have a high density of rental tenancies rather than residential homeowners.⁷ Any failure of First Department residents to pay for the cost of their abodes implicates eviction proceedings rather than foreclosure proceedings, whereas in the Second Department, the dynamic is likely the opposite.⁸ As for the Third and Fourth Departments, where residential arrangements may be more akin to those of the Second Department, the Second Department represents 51% of New York State’s residents, thereby placing a greater percentage of foreclosure cases there.⁹ For these reasons, the Second Department is the appellate division that has addressed the largest overall number of residential mortgage foreclosure cases, as will be

³ See discussion *infra* Parts I–VIII.

⁴ Mark C. Dillon, *The Extent to Which “Yellowstone Injunctions” Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue?*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 287, 290–91 (2011).

⁵ See *About the Court*, APP. DIVISION, SECOND JUD. DEPT., <http://www.courts.state.ny.us/courts/ad2/aboutthecourt.shtml> (last visited Feb. 17, 2013).

⁶ See Dillon, *supra* note 4, at 290–91.

⁷ Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation’s Foreclosure Crisis*, 2 ALB. GOV’T L. REV. 1, 4–5 (2009) (citations omitted).

⁸ See Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 192–93 (2009).

⁹ See *About the Court*, *supra* note 5.

discussed here.

I. STANDING, STANDING, STANDING

The standing of a bank or mortgage company to prosecute a residential mortgage foreclosure action may be the subject that has received the most attention of the practicing bar in prosecuting, or defeating, foreclosure complaints.¹⁰ Under CPLR section 3211(a)(3), a party's lack of legal capacity to sue is a basis for a defendant to seek dismissal of the plaintiff's complaint altogether.¹¹ The statute is, perhaps, inartfully worded, as New York case law has interpreted CPLR 3211(a)(3) as applying to both "legal capacity" and "standing," even though standing is not specifically mentioned in the subdivision and there is a fine distinction between the two concepts.¹² "Capacity" speaks to the ability of a plaintiff to bring and prosecute an action.¹³ "Standing," by contrast, speaks to whether the plaintiff with legal capacity has a sufficient interest in a litigation to be recognized as an aggrieved plaintiff.¹⁴

In the realm of residential mortgage foreclosures, dismissal motions to trial-level courts, and appeals from the decisions and orders arising from such motions, have focused upon the issue of standing rather than the issue of capacity.¹⁵ The appellate divisions of our state, and particularly the Second Department, have addressed a variety of standing-related mortgage foreclosure issues, as described below.

¹⁰ See discussion *infra* Part I.A–B.

¹¹ N.Y. C.P.L.R. 3211(a)(3) (McKinney 2013).

¹² *Silver v. Pataki*, 96 N.Y.2d 532, 537, 755 N.E.2d 842, 846, 730 N.Y.S.2d 482, 486 (2001) (per curiam); *Cnty. Bd. 7 of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154–55, 639 N.E.2d 1, 3–4, 615 N.Y.S.2d 644, 646–47 (1994); *In re Montano v. Cnty. Legislature of Suffolk Cnty.*, 70 A.D.3d 203, 215, 891 N.Y.S.2d 82, 90 (App. Div. 2d Dep't 2009); *Caprer v. Nussbaum*, 36 A.D.3d 176, 181–82, 825 N.Y.S.2d 55, 62 (App. Div. 2d Dep't 2006); *Security Pac. Nat'l Bank v. Evans*, 31 A.D.3d 278, 279, 820 N.Y.S.2d 2, 2–3 (App. Div. 1st Dep't 2006).

¹³ *Cnty. Bd. 7*, 84 N.Y.2d at 154–55, 639 N.E. at 3–4, 615 N.Y.S.2d at 644; see *Moran Enters., Inc. v. Hurst*, 66 A.D.3d 972, 975, 888 N.Y.S.2d 109, 112 (App. Div. 2d Dep't 2009); *Edwards v. Siegel, Kelleher & Kahn*, 26 A.D.3d 789, 790, 811 N.Y.S.2d 828, 829 (App. Div. 4th Dep't 2006); *Sta-Brite Servs., Inc. v. Sutton*, 17 A.D.3d 570, 571, 794 N.Y.S.2d 70, 72 (App. Div. 2d Dep't 2005); *Kittinger v. Churchill Evangelistic Ass'n*, 239 A.D. 253, 256–57, 267 N.Y.S. 719, 722 (App. Div. 4th Dep't 1933).

¹⁴ *Caprer*, 36 A.D.3d at 182, 825 N.Y.S.2d at 62; see *GECCMC 2007-CI Ditmars Lodging, LLC v. Mohola, LLC*, 84 A.D.3d 1311, 1312, 924 N.Y.S.2d 531, 532 (App. Div. 2d Dep't 2011); *Tae Hwa Yoon v. N.Y. Hahn Wolee Church, Inc.*, 56 A.D.3d 752, 755, 870 N.Y.S.2d 42, 44 (App. Div. 2d Dep't 2008); *Vill. of Pomona v. Town of Ramapo*, 41 A.D.3d 837, 839–40, 838 N.Y.S.2d 653, 654 (App. Div. 2d Dep't 2007); *Old Clinton Corp. v. 502 Old Country Rd., L.L.C.*, 5 A.D.3d 363, 364, 773 N.Y.S.2d 410, 412 (App. Div. 2d Dep't 2004).

¹⁵ See discussion *infra* Part I.A–B.

A. Issues Peculiar to the Standing of Plaintiffs

It is axiomatic that lenders generally establish their *prima facie* entitlement to summary judgment in mortgage foreclosure actions by merely submitting to the court copies of the mortgage, the unpaid note, and the borrower's default.¹⁶ The establishment of

¹⁶ Swedbank, AB v. Hale Ave. Borrower, LLC, 89 A.D.3d 922, 923, 932 N.Y.S.2d 540, 541 (App. Div. 2d Dep't 2011); Deutsche Bank Nat'l Trust Co. v. Posner, 89 A.D.3d 674, 674-75, 933 N.Y.S.2d 52, 52-53 (App. Div. 2d Dep't 2011); HSBC Bank USA, N.A. v. Schwartz, 88 A.D.3d 961, 961, 931 N.Y.S.2d 528, 528 (App. Div. 2d Dep't 2011); Rossrock Fund II, L.P. v. Osborne, 82 A.D.3d 737, 737, 918 N.Y.S.2d 514, 515 (App. Div. 2d Dep't 2011); Wells Fargo Bank, N.A. v. Cohen, 80 A.D.3d 753, 755, 915 N.Y.S.2d 569, 571 (App. Div. 2d Dep't 2011); Argente Mortg. Co. v. Mentasana, 79 A.D.3d 1079, 1080, 915 N.Y.S.2d 591, 592-93 (App. Div. 2d Dep't 2010); Zanfini v. Chandler, 79 A.D.3d 1031, 1031, 912 N.Y.S.2d 911, 911 (App. Div. 2d Dep't 2010); Emigrant Mortg. Co. v. Turk, 71 A.D.3d 721, 722, 895 N.Y.S.2d 722, 722 (App. Div. 2d Dep't 2010); Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC, 70 A.D.3d 882, 883, 895 N.Y.S.2d 199, 201 (App. Div. 2d Dep't 2010); Countrywide Home Loans, Inc. v. Delphonse, 64 A.D.3d 624, 625, 883 N.Y.S.2d 135, 136 (App. Div. 2d Dep't 2009); Wash. Mut. Bank, F.A. v. O'Connor, 63 A.D.3d 832, 833, 880 N.Y.S.2d 696, 696 (App. Div. 2d Dep't 2009); JP Morgan Chase Bank, N.A. v. Agnello, 62 A.D.3d 662, 663, 878 N.Y.S.2d 397, 398 (App. Div. 2d Dep't 2009); Yildiz v. Vural Mgmt. Corp., 61 A.D.3d 970, 970, 877 N.Y.S.2d 466, 466 (App. Div. 2d Dep't 2009); Wells Fargo Bank, N.A. v. Webster, 61 A.D.3d 856, 856, 877 N.Y.S.2d 200, 201 (App. Div. 2d Dep't 2009); Aurora Loan Servs., LLC v. Thomas, 53 A.D.3d 561, 561, 862 N.Y.S.2d 89, 90 (App. Div. 2d Dep't 2008); Cassara v. Wynn, 55 A.D.3d 1356, 1356, 865 N.Y.S.2d 436, 436 (App. Div. 4th Dep't 2008); Rose v. Levine, 52 A.D.3d 800, 801, 861 N.Y.S.2d 374, 375 (App. Div. 2d Dep't 2008); Popular Fin. Servs., LLC v. Williams, 50 A.D.3d 660, 660, 855 N.Y.S.2d 581, 582 (App. Div. 2d Dep't 2008); U.S. Bank Nat'l Ass'n Tr. U/S 6/01/08 (Home Equity Trust 1998-2) v. Alvarez, 49 A.D.3d 711, 711, 854 N.Y.S.2d 171, 171 (App. Div. 2d Dep't 2008); Charter One Bank, FSB v. Leone, 45 A.D.3d 958, 958-59, 845 N.Y.S.2d 513, 515 (App. Div. 3d Dep't 2007); Aames Funding Corp. v. Houston, 44 A.D.3d 692, 693, 843 N.Y.S.2d 660, 661 (App. Div. 2d Dep't 2007); Red Tulip, LLC v. Neiva, 44 A.D.3d 204, 209, 842 N.Y.S.2d 1, 5 (App. Div. 1st Dep't 2007); Wells Fargo Bank Minn., Nat'l Ass'n v. Mastrapaolo, 42 A.D.3d 239, 244-45, 837 N.Y.S.2d 247, 251 (App. Div. 2d Dep't 2007); Daniel Perla Assocs., LP v. 101 Kent Assocs., Inc., 40 A.D.3d 677, 677-78, 836 N.Y.S.2d 630, 631 (App. Div. 2d Dep't 2007); Witelson v. Jam. Estates Holding Corp. I, 40 A.D. 284, 284, 835 N.Y.S.2d 179, 180 (App. Div. 1st Dep't 2007); Cochran Inv. Co. v. Jackson, 38 A.D.3d 704, 704-05, 834 N.Y.S.2d 198, 198 (App. Div. 2d Dep't 2007); Marculescu v. Ovanez, 27 A.D.3d 701, 701, 815 N.Y.S.2d 598, 599 (App. Div. 2d Dep't 2006); Campaign v. Barba, 23 A.D.3d 327, 327, 805 N.Y.S.2d 86, 86 (App. Div. 2d Dep't 2005); NC Venture I, L.P. v. Complete Analysis, Inc., 22 A.D.3d 540, 543, 803 N.Y.S.2d 95, 98 (App. Div. 2d Dep't 2005); Household Fin. Realty Corp. of N.Y. v. Winn, 19 A.D.3d 545, 546, 796 N.Y.S.2d 533, 534 (App. Div. 2d Dep't 2005); LPP Mortg., Ltd. v. Card Corp., 17 A.D.3d 103, 104, 793 N.Y.S.2d 346, 346 (App. Div. 1st Dep't 2005); Fleet Nat'l Bank v. Olasov, 16 A.D.3d 374, 374, 793 N.Y.S.2d 52, 52 (App. Div. 2d Dep't 2005); U.S. Bank Trust N.A. Trustee v. Butti, 16 A.D.3d 408, 408, 792 N.Y.S.2d 505, 506 (App. Div. 2d Dep't 2005); Larkfield Manor, Inc. v. KBK Enters., LLC, 5 A.D.3d 444, 445, 772 N.Y.S.2d 591, 591 (App. Div. 2d Dep't 2004); Coppa v. Fabozzi, 5 A.D.3d 718, 718, 773 N.Y.S.2d 604, 604 (App. Div. 2d Dep't 2004); Republic Nat'l Bank of N.Y. v. O'Kane, 308 A.D.2d 482, 482, 764 N.Y.S.2d 635, 635 (App. Div. 2d Dep't 2003); Marshall v. Alaliewie, 304 A.D.2d 1032, 1033, 757 N.Y.S.2d 162, 163 (App. Div. 3d Dep't 2003); Tower Funding, Ltd. v. David Berry Realty, Inc., 302 A.D.2d 513, 514, 755 N.Y.S.2d 413, 415 (App. Div. 2d Dep't 2003); M&T Mortg. Corp. v. Ethridge, 300 A.D.2d 286, 286-87, 751 N.Y.S.2d 741, 741 (App. Div. 2d Dep't 2002); Credit-Based Asset Servicing & Securitization, LLC v. Grimmer, 299 A.D.2d 887, 887, 750 N.Y.S.2d 673, 675 (App. Div. 4th Dep't 2002); EMC Mortg. Corp. v. Riverdale Assocs., 291 A.D.2d 370, 370, 737 N.Y.S.2d 114, 115 (App. Div. 2d

summary judgment is fairly easy for institutional lenders, as the relevant proof is derived from easily-obtained documentary evidence.¹⁷ For this reason, foreclosure plaintiffs will typically file and serve motions for summary judgment shortly after the defendant has appeared and answered, or seek summary judgment upon the defendant's default in appearing and answering.¹⁸

The entitlement of a bank or mortgage company to a favorable judgment presumes that the lender in the action has the necessary standing to bring the claim in the first instance.¹⁹ Defendants in foreclosure actions, unable in many instances to rebut their failures to timely pay their mortgage obligations, may best defeat the actions not upon the substantive merits, but upon the procedural defense of standing.²⁰ Hence, mortgage defendants have argued, and the courts have addressed, the peculiar requirements that foreclosure plaintiffs must meet to sustain their standing to sue.

As noted, the summary judgment standard in mortgage

Dep't 2002); *Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 794, 736 N.Y.S.2d 737, 740 (App. Div. 3d Dep't 2002); *IMC Mortg. Co. v. Griggs*, 289 A.D.2d 294, 294, 733 N.Y.S.2d 918, 919 (App. Div. 2d Dep't 2001); *Schantz v. O'Sullivan*, 288 A.D.2d 536, 536-37, 731 N.Y.S.2d 808, 809 (App. Div. 3d Dep't 2001); *Paterson v. Rodney*, 285 A.D.2d 453, 454, 727 N.Y.S.2d 333, 333 (App. Div. 2d Dep't 2001); *Sansone v. Cavallaro*, 284 A.D.2d 817, 818, 727 N.Y.S.2d 516, 517 (App. Div. 3d Dep't 2001); *United Cos. Lending Corp. v. Hingos*, 283 A.D.2d 764, 765, 724 N.Y.S.2d 134, 135 (App. Div. 3d Dep't 2001); *Republic Nat'l Bank of N.Y. v. Zito*, 280 A.D.2d 657, 658, 721 N.Y.S.2d 244, 244 (App. Div. 2d Dep't 2001); *Simoni v. Time-Line, Ltd.*, 272 A.D.2d 537, 537, 708 N.Y.S.2d 142, 143 (App. Div. 2d Dep't 2000); *Delta Funding Corp. v. Yaede*, 268 A.D.2d 554, 554, 702 N.Y.S.2d 854, 855 (App. Div. 2d Dep't 2000); *First Union Nat'l Bank v. Weston*, 261 A.D.2d 668, 669, 689 N.Y.S.2d 543, 545 (App. Div. 3d Dep't 1999); *Sinardi v. Rivera*, 261 A.D.2d 388, 388, 689 N.Y.S.2d 236, 237 (App. Div. 2d Dep't 1999); *Hoffman v. Kraus*, 260 A.D.2d 435, 436, 688 N.Y.S.2d 575, 576 (App. Div. 2d Dep't 1999); *Mahopac Nat'l Bank v. Baisley*, 244 A.D.2d 466, 467, 664 N.Y.S.2d 345, 346 (App. Div. 2d Dep't 1997); *Bercy Investors, Inc. v. Sun*, 239 A.D.2d 161, 161, 657 N.Y.S.2d 47, 48 (App. Div. 1st Dep't 1997); *Fed. Home Loan Mortg. Corp. v. Karastathis*, 237 A.D.2d 558, 559, 655 N.Y.S.2d 631, 632 (App. Div. 2d Dep't 1997); *Chem. Bank v. Bowers*, 228 A.D.2d 407, 408, 643 N.Y.S.2d 653, 654 (App. Div. 2d Dep't 1996); *DiNardo v. Patcam Serv. Station, Inc.*, 228 A.D.2d 543, 543, 644 N.Y.S.2d 779, 780 (App. Div. 2d Dep't 1996); *N. Fork Bank v. Hamptons Mist Mgmt. Corp.*, 225 A.D.2d 595, 596, 639 N.Y.S.2d 452, 453 (App. Div. 2d Dep't 1996); *Home Sav. Bank v. Schorr Bros. Dev. Corp.*, 213 A.D.2d 512, 512-13, 624 N.Y.S.2d 53, 54 (App. Div. 2d Dep't 1995); *Governor & Co. of the Bank of Ir. v. Dromoland Castle Ltd.*, 212 A.D.2d 759, 759, 624 N.Y.S.2d 855, 856 (App. Div. 2d Dep't 1995); *Zitel Corp. v. Fonar Corp.*, 210 A.D.2d 221, 221, 619 N.Y.S.2d 964, 964 (App. Div. 2d Dep't 1994); *Vill. Bank v. Wild Oaks Holding, Inc.*, 196 A.D.2d 812, 812, 601 N.Y.S.2d 940, 940 (App. Div. 2d Dep't 1993); *Silber v. Muschel*, 190 A.D.2d 727, 727-28, 593 N.Y.S.2d 306, 307 (App. Div. 2d Dep't 1993); *Metro. Distrib. Servs. v. DiLascio*, 176 A.D.2d 312, 312, 574 N.Y.S.2d 755, 756 (App. Div. 2d Dep't 1991); *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 791-92, 493 N.Y.S.2d 226, 227 (App. Div. 2d Dep't 1985), *aff'd*, 67 N.Y.2d 627 (1986).

¹⁷ See *Rossrock Fund II, LP*, 82 A.D.3d at 737, 918 N.Y.S.2d at 515.

¹⁸ See *Swedbank, AB*, 89 A.D.3d at 923, 932 N.Y.S.2d at 541.

¹⁹ See, e.g., *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 277, 926 N.Y.S.2d 532, 535 (App. Div. 2d Dep't 2011).

²⁰ See *id.*

foreclosure actions requires that the plaintiff establish the mortgage, the unpaid note, and the defendant's default.²¹ Where the plaintiff was not the original lender but obtained its rights to the mortgage and note by an assignment, the plaintiff requesting summary judgment must also provide evidence that it received the mortgage and note by a proper prior assignment.²² The mere production in motion papers of a copy of the mortgage and note is not necessarily dispositive of the issue of standing.²³ It is very common in the mortgage business for the original lender to sell or assign its rights in mortgages to third parties, so that by the time defendants default upon their payment obligations, the party that is truly at interest is a subsequent purchaser or assignee of the mortgage and note.²⁴ This complicates the issue of standing, as the party that becomes entitled to the payments upon a mortgage, such

²¹ See, e.g., *Rosrock Fund II, LP*, 82 A.D.3d at 737, 918 N.Y.S.2d at 515.

²² See N.Y. GEN. OBLIG. LAW § 13-105 (McKinney 2013); *Wells Fargo Bank v. Wine*, 90 A.D.3d 1216, 1217, 935 N.Y.S.2d 664, 666 (App. Div. 3d Dep't 2011); *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011); *Citimortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 761, 931 N.Y.S.2d 638, 639 (App. Div. 2d Dep't 2011); *Deutsche Bank Nat'l Trust Co. v. Barnett*, 88 A.D.3d 636, 637, 931 N.Y.S.2d 630, 631 (App. Div. 2d Dep't 2011); *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 207, 887 N.Y.S.2d 615, 617 (App. Div. 2d Dep't 2009); *LaSalle Bank Nat'l Ass'n v. Ahearn*, 59 A.D.3d 911, 912, 875 N.Y.S.2d 595, 597 (App. Div. 3d Dep't 2009); *Bankers Trust Co. v. Hoovis*, 263 A.D.2d 937, 938, 694 N.Y.S.2d 245, 247 (App. Div. 3d Dep't 1999); *20 E. 17th St. LLC v. 4 M Dev. Co.*, 246 A.D.2d 341, 342, 666 N.Y.S.2d 912, 913 (App. Div. 1st Dep't 1998); *RCR Servs. Inc. v. Herbil Holding Co.*, 229 A.D.2d 379, 379, 645 N.Y.S.2d 76, 76 (App. Div. 2d Dep't 1996); *Kluge v. Fugazy*, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep't 1988); *HSBC Bank USA, N.A. v. Taher*, No. 9320/09, 2011 N.Y. Misc. LEXIS 6147, at *14 (N.Y. Sup. Ct. Kings County Dec. 22, 2011); *Wells Fargo Bank, N.A. v. McNee*, No. 100566/08, 2011 N.Y. Misc. LEXIS 5962, at *10 (Sup. Ct. Richmond County Nov. 28, 2011); *LIC Assets, LLC v. Chricker Realty, LLC*, No. 11706/2011, 2011 N.Y. Misc. LEXIS 5979, at *8-9 (Sup. Ct. Queens County Nov. 23, 2011); *Wells Fargo Bank, N.A. v. Gallo*, No. 34182/09, 2011 N.Y. Misc. LEXIS 5966, at *8-9 (Sup. Ct. Queens County June 27, 2011); *HSBC Mortg. Corp. (USA) v. Morocho*, No. 28995/08, 2011 N.Y. Misc. LEXIS 2662, at *10-11 (Sup. Ct. Queens County May 24, 2011); *Deutsche Bank Trust Ams. v. McCoy*, No. 7782-2008, 2011 N.Y. Misc. LEXIS 4640, at *12-13 (Sup. Ct. Suffolk County Sept. 21, 2010); *Fin. Freedom SFC v. Slinkosky*, No. 11879/2009, 2010 N.Y. Misc. LEXIS 3270, at *3 (Sup. Ct. Suffolk County June 24, 2010); *IndyMac F.S.B. v. Garcia*, No. 7282-2008, 2010 N.Y. Misc. LEXIS 2795, at *4-6 (Sup. Ct. Suffolk County June 22, 2010); *JP Morgan Chase Bank, N.A. v. George*, No. 10865/06, 2010 N.Y. Misc. LEXIS 943, at *8-9 (Sup. Ct. Kings County May 4, 2010); *US Bank, N.A. v. Flynn*, No. 4215/2008, 2010 N.Y. Misc. LEXIS 511, at *2-4 (Sup. Ct. Suffolk County Mar. 12, 2010); *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 597, 843 N.Y.S.2d 495, 497 (Sup. Ct. Suffolk County 2007).

²³ See, e.g., *Wine*, 90 A.D.3d at 1217, 935 N.Y.S.2d at 666 ("In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." (internal quotation marks omitted) (quoting *Rosenthal*, 88 A.D.3d at 761, 931 N.Y.S.2d at 639) (other citations omitted)).

²⁴ See, e.g., *Marchione*, 69 A.D.3d at 205-06, 887 N.Y.S.2d at 616 (discussing the assignment of the defendant's loan from the original mortgagee to the plaintiff).

as by assignment, must establish the assignment in order to evidence its standing.²⁵ Evidencing a proper assignment has tripped up a number of plaintiffs in their motions for summary judgment.²⁶

One way that plaintiffs' standing by assignment has proven problematic regards the *timing* of the assignment itself. Until recently, it was unsettled whether mortgage assignments needed to precede the commencement of foreclosure litigations, or whether assignment documentation could be executed after the commencement of litigation with language of retroactive effect.²⁷ This issue was addressed in an opinion by Justice John Leventhal of the Appellate Division, Second Department, in the case of *Wells Fargo Bank v. Marchione*.

In *Marchione*, the defendants executed a note and mortgage in favor of their lender, Option One Mortgage Corporation ("Option One") on September 2, 2005, and defaulted in making their payments on the note due as of April 1, 2007.²⁸ The plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo,") was the trustee of Option One and commenced a "foreclosure action by filing a summons and verified complaint on November 30, 2007."²⁹ Option One executed an assignment of its rights, title, and interest in the mortgage to Wells Fargo on December 4, 2007, containing language making the assignment effective as of a retroactive date, October 28, 2007.³⁰ Therefore, the relevant assignment was executed after the commencement of the foreclosure action, but its retroactive effective date preceded the action's commencement by approximately one month. The defendants filed a pre-answer motion to dismiss Wells Fargo's complaint based upon attorney verification issues, and Wells Fargo attached as an exhibit to its opposing papers a copy of

²⁵ See GEN. OBLIG. LAW § 13-105; *Marchione*, 69 A.D.3d at 207, 887 N.Y.S.2d at 617; *Ahearn*, 59 A.D.3d at 912, 875 N.Y.S.2d at 597; *Hoovis*, 263 A.D.2d at 938, 694 N.Y.S.2d at 247; *20 E. 17th St. LLC*, 246 A.D.2d at 342, 666 N.Y.S.2d at 913; *RCR Servs. Inc.*, 229 A.D.2d at 380–81, 645 N.Y.S.2d at 77; *Kluge*, 145 A.D.2d at 538, 536 N.Y.S.2d at 93; *Taylor*, 17 Misc. 3d at 597, 843 N.Y.S.2d at 497.

²⁶ See *Stosel*, 89 A.D.3d at 888, 934 N.Y.S.2d at 183; *Barnett*, 88 A.D.3d at 637–38, 931 N.Y.S.2d at 631–32; *Ahearn*, 59 A.D.3d at 912–13, 875 N.Y.S.2d at 597.

²⁷ *Marchione*, 69 A.D.3d at 207, 887 N.Y.S.2d at 617 (noting the confusion among appellate decisions regarding the timing of assignments, the commencement of foreclosure actions, and plaintiff standing).

²⁸ *Id.* at 205–06, 887 N.Y.S.2d at 616. According to the opinion, both defendants, who were husband and wife, executed the mortgage on their residential property, but only defendant Vincent Marchione executed the note. See *id.*

²⁹ *Id.* at 206, 887 N.Y.S.2d at 616.

³⁰ *Id.*

the assignment from Option One.³¹ Learning of the assignment for the first time from those papers, the defendants argued in reply that Wells Fargo lacked standing because at the time the action was commenced, the assignment did not yet exist.³² “The complaint alleged that Wells Fargo was the ‘sole, true and lawful owner of record of the bond(s), note(s) and mortgage(s) securing the Mortgaged Premises,’” an allegation that could not have been true at the time the plaintiff’s attorney verified the pleading.³³ The Supreme Court, Westchester County, dismissed the complaint based upon the plaintiff’s lack of standing.³⁴

On appeal, the Second Department affirmed the dismissal of Wells Fargo’s complaint.³⁵ After analyzing relevant decisional authorities from the Second and Third Departments, particularly *Bankers Trust Co. v. Hoovis*,³⁶ *LaSalle Bank National Ass’n v. Ahearn*,³⁷ and *RCR Services Inc. v. Herbil Holding Co.*,³⁸ Justice Leventhal concluded in his opinion that Wells Fargo lacked standing because it was not an assignee of the mortgage and note as of the date the action was commenced by filing.³⁹ Arguments that the assignment could be made effective retroactively, or effective if executed before service of process upon the defendants, were held to be unpersuasive.⁴⁰ The conclusion reached in *Marchione* is consistent with reasoning earlier applied by the Third Department

³¹ *Id.*

³² *Id.* at 206–07, 887 N.Y.S.2d at 616–17.

³³ *Id.* at 206, 887 N.Y.S.2d at 616.

³⁴ *Id.* at 205, 887 N.Y.S.2d at 616.

³⁵ *Id.* at 205, 211, 887 N.Y.S.2d at 616, 620.

³⁶ *Bankers Trust Co. v. Hoovis*, 263 A.D.2d 937, 694 N.Y.S.2d 245 (App. Div. 3d Dep’t 1999).

³⁷ *LaSalle Bank Nat’l Ass’n v. Ahearn*, 59 A.D.3d 911, 875 N.Y.S.2d 595 (App. Div. 3d Dep’t 2009).

³⁸ *RCR Servs. Inc. v. Herbil Holding Co.*, 229 A.D.2d 379, 645 N.Y.S.2d 76 (App. Div. 2d Dep’t 1996).

³⁹ *Marchoine*, 69 A.D.3d at 211, 887 N.Y.S.2d at 620. *See, e.g.*, *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep’t 2009); *Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 709–10, 888 N.Y.S.2d 914, 914–15 (App. Div. 2d Dep’t 2009); *Ahearn*, 59 A.D.3d at 912–13, 875 N.Y.S.2d at 597; *Mortg. Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674, 838 N.Y.S.2d 622, 623 (App. Div. 2d Dep’t 2007); *Fed. Nat’l Mortg. Ass’n v. Youkelsone*, 303 A.D.2d 546, 546–47, 755 N.Y.S.2d 730, 731 (App. Div. 2d Dep’t 2003); *Hoovis*, 263 A.D.2d at 938, 694 N.Y.S.2d at 247; *First Trust Nat’l Ass’n v. Meisels*, 234 A.D.2d 414, 414, 651 N.Y.S.2d 121, 122 (App. Div. 2d Dep’t 1996); *Kluge v. Fugazy*, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep’t 1988).

⁴⁰ *Marchione*, 69 A.D.3d at 209–10, 887 N.Y.S.2d at 619. Arguably, the execution of an assignment prior to the date of service of process upon the defendant could be effective prior to the amendment of CPLR section 304(a), effective July 1, 1992, that converted New York from a “service state” to the “filing state” for the commencement of actions and special proceedings. *See* Act of June 23, 1992, ch. 216, § 4, 1992 N.Y. Laws 831, 834.

in *LaSalle Bank National Ass'n v. Ahearn*.⁴¹ More recent decisions from the appellate divisions have adopted the same *stare decisis* reasoning.⁴²

As a general matter, once the note is tendered to and accepted by the assignee, the mortgage passes to the assignee incident to the note.⁴³ The result is different if the converse is true. The written assignment of a mortgage, without the underlying note, is a nullity and no interest is acquired by the mere assignment of a mortgage.⁴⁴

The complications associated with the assignment or transmittal of a mortgage without a concomitant assignment or transmittal of the note became particularly apparent through the operations of the Mortgage Electronic Registration Systems ("MERS"). "MERS . . . was created by several large participants in the real estate mortgage industry [for the purpose of] track[ing] ownership interests in residential mortgages."⁴⁵ Members of MERS, consisting

⁴¹ *Ahearn*, 59 A.D.3d at 912–13, 875 N.Y.S.2d at 597.

⁴² See *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011); *Deutsche Bank Nat'l Trust Co. v. Barnett*, 88 A.D.3d 636, 637, 931 N.Y.S.2d 630, 631 (App. Div. 2d Dep't 2011); *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279–80, 926 N.Y.S.2d 532, 536–37 (App. Div. 2d Dep't 2011); *US Bank Nat'l Ass'n v. Madero*, 80 A.D.3d 751, 752–53, 915 N.Y.S.2d 612, 613–14 (App. Div. 2d Dep't 2011); *Collymore*, 68 A.D.3d at 753–54, 890 N.Y.S.2d at 580; *Kluge*, 145 A.D.2d at 538, 536 N.Y.S.2d at 93; see also *Flyer v. Sullivan*, 284 A.D. 697, 698–99, 134 N.Y.S.2d 521, 523 (App. Div. 1st Dep't 1954); *Beak v. Walts*, 266 A.D. 900, 900, 42 N.Y.S.2d 652, 653 (App. Div. 4th Dep't 1943) (per curiam). The supreme courts have also adopted similar *stare decisis* reasoning. See *Bank of Am., N.A. v. Kang*, No. 104587/10, 2011 WL 5295014, at *4–5 (N.Y. Sup. Ct. N.Y. County Oct. 17, 2011); *Bank of N.Y. v. Mulligan*, No. 29399/07, 2010 WL 3339452, at *5 (N.Y. Sup. Ct. Kings County Aug. 25, 2010); *JP Morgan Chase Bank, N.A. v. George*, No. 10865/06, 2010 WL 1780952, at *3 (N.Y. Sup. Ct. Kings County May 4, 2010); *Deutsche Bank Nat'l Trust Co. v. Abbate*, No. 100893/07, 2009 WL 3384474, at *1 (N.Y. Sup. Ct. Richmond County Oct. 6, 2009).

⁴³ *Carpenter v. Longan*, 83 U.S. 271, 274 (1873); *Deutsche Bank Trust Co. Ams. v. Codio*, 94 A.D.3d 1040, 1041, 943 N.Y.S.2d 545, 546 (App. Div. 2d Dep't 2012); *Silverberg*, 86 A.D.3d at 280, 926 N.Y.S.2d at 537; *Coakley*, 41 A.D.3d at 674, 838 N.Y.S.2d at 623; *In re Parisi*, 2011 WL 6945919, at *6 (N.Y. Sur. Ct. Dec. 22, 2011); *Wells Fargo Bank, N.A. v. McNee*, No. 100566/08, 2011 WL 6738618, at *3 (N.Y. Sup. Ct. Richmond County Nov. 28, 2011); *Kang*, 2011 WL 5295014, at *4.

⁴⁴ *Barnett*, 88 A.D.3d at 637, 931 N.Y.S.2d at 631; *Silverberg*, 86 A.D.3d at 280, 926 N.Y.S.2d at 537; *Madero*, 80 A.D.3d at 752–53, 915 N.Y.S.2d at 613; *Collymore*, 68 A.D.3d at 754, 890 N.Y.S.2d at 580; *Kluge*, 145 A.D.2d at 538, 536 N.Y.S.2d at 93; *Citigroup Global Mkts. Realty Corp. v. Smith*, No. 3921/2008, 2011 WL 6224555, at *1 (N.Y. Sup. Ct. Kings County Dec. 13, 2011); *Flyer*, 284 A.D. at 698, 134 N.Y.S.2d at 523; *Beak*, 266 A.D. at 900, 42 N.Y.S.2d at 653.

⁴⁵ *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96, 861 N.E.2d 81, 83, 828 N.Y.S.2d 266, 268 (2006) (footnote omitted). The action addressed the question of whether county clerks are required to record and index mortgages, mortgage assignments, and mortgage discharges naming MERS as nominee or mortgagee of record, *id.* at 95, 861 N.E.2d at 82, 828 N.Y.S.2d at 267, and answered that question in the affirmative, *id.* at 99, 861 N.E.2d at 85, 828 N.Y.S.2d at 270; see also Jeffrey R. Metz, *In A Mortgage Foreclosure, Having Possession of the Mortgage Is Not Enough*, BLOOMBERG BANKING DAILY, Feb. 21, 2012, available at 2012 WL 521446 (explaining that to obtain standing an assignee, including MERS, must have the note

of mortgage lenders and other entities, pay annual fees in exchange for the system's electronic registration and tracking of mortgages for them.⁴⁶ Lenders name MERS as their "nominee or mortgagee of record" to record their mortgages with county clerk's offices.⁴⁷ Later, if a mortgage's ownership or servicing rights are transferred from one MERS member to another member, MERS electronically and privately tracks the assignment of rights, without any public recording of the assignments.⁴⁸

The viability of the MERS methodology for assigning mortgage rights and conferring standing arose in the case of *Bank of New York v. Silverberg*.⁴⁹ *Silverberg* resulted in another foreclosure-related opinion by Justice John Leventhal of the Appellate Division, Second Department.⁵⁰ In that opinion, the Second Department held that even assuming MERS could rightfully assign the mortgages that it was responsible for electronically recording as an agent or "nominee" of the mortgagee, its membership agreement did not accomplish the assignment of the related underlying notes.⁵¹

and mortgage prior to foreclosure).

⁴⁶ *MERSCORP, Inc.*, 8 N.Y.3d at 96, 861 N.E.2d at 83, 861 N.Y.S.2d at 268.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Silverberg*, 86 A.D.3d at 281–82, 926 N.Y.S.2d at 538.

⁵⁰ *Id.* at 275, 926 N.Y.S.2d at 533.

⁵¹ *Id.* at 281, 926 N.Y.S.2d at 538. To maintain a foreclosure action, an assignee must have been assigned both the mortgage and the note. *E.g.*, Wells Fargo Bank, N.A. v. Wine, 90 A.D.3d 1216, 1217, 935 N.Y.S.2d at 664, 666 (App. Div. 3d Dep't 2011). A nominee, therefore, must be authorized by its agreement with the original lender to assign both the mortgage and the note. *See id.*; Deutsche Bank Nat'l Trust Co. v. Barnett, 88 A.D.3d 636, 637, 931 N.Y.S.2d 630, 631 (App. Div. 2d Dep't 2011); CIT Group/Consumer Fin., Inc. v. Platt, No. 11410/08, 2011 WL 6118534, at *2 (N.Y. Sup. Ct. Queens County Dec. 7, 2011); U.S. Bank Nat'l Ass'n v. Bressler, No. 33920/08, 2011 WL 6115849, at *1 (N.Y. Sup. Ct. Kings County Dec. 7, 2011); Lic Assets, LLC v. Chriker Realty, LLC, No. 11706/2011, 2011 WL 6738677, at *4 (N.Y. Sup. Ct. Queens County Nov. 23, 2011); HSBC Bank USA, N.A. v. Taher, No. 9320/09, 2011 WL 2610525, at *9 (N.Y. Sup. Ct. Kings County July 1, 2011); Wells Fargo Bank, N.A. v. Gallo, No. 34182/09, 2011 WL 6738917, at *5 (N.Y. Sup. Ct. Queens County June 27, 2011); HSBC Mortg. Corp. (USA) v. Morocho, No. 28995/2008, 2011 WL 2200471, at *4 (N.Y. Sup. Ct. Queens County May 24, 2011); LNV Corp. v. Madison Real Estate, LLC, No. 103576/2010, 2010 WL 5126043, at *3 (N.Y. Sup. Ct. New York County Dec. 6, 2010); HSBC Bank USA v. Squiteri, No. 232285/09, 2010 WL 4723444, at *3 (N.Y. Sup. Ct. Kings County Oct. 22, 2010); Onewest Bank, F.S.B. v. Drayton, 29 Misc. 3d 1021, 1039, 910 N.Y.S.2d 857, 870 (Sup. Ct. Kings County 2010); Deutsche Bank Trust Co. Ams. v. McCoy, No. 7782-2008, 2010 WL 3769220, at *4 (N.Y. Sup. Ct. Suffolk County Sept. 21, 2010); LPP Mortg. Ltd. v. Sabine Props., LLC, No. 103648/10, 2010 WL 3483923, at *3 (N.Y. Sup. Ct. New York County Aug. 27, 2010); Bank of N.Y. v. Mulligan, No. 29399/07, 2010 WL 3339452, at *6 (N.Y. Sup. Ct. Kings County Aug. 25, 2010); HSBC Bank USA, N.A. v. Yeasmin, No. 34143/07, 2010 WL 2089273, at *4 (N.Y. Sup. Ct. Kings County May 24, 2010); Bank of N.Y. v. Alderazi, 28 Misc. 3d 376, 379, 900 N.Y.S.2d 821, 824 (Sup. Ct. Kings County 2010); HSBC Bank USA, N.A. v. Vasquez, No. 37410/07, 2009 WL 2581672, at *3 (N.Y. Sup. Ct. Kings County Aug. 21, 2009); Bank of N.Y. v. Trezza, No. 16139-2006, 2006 WL 3593427, at *1 (N.Y. Sup. Ct. Suffolk

Consequently, in that case, a purported assignment from MERS to the plaintiff, Bank of New York, was found to be invalid as to the note.⁵² The opinion is significant given the tremendous volume of mortgages that MERS records and apparently assigns as an agent or nominee of its members.⁵³ From that gross number, more than thirteen thousand foreclosure actions have been filed against New York State homeowners.⁵⁴

A second standing-related issue that has proven problematic for plaintiffs regards their actual possession of the mortgage and note on which the foreclosure lawsuit is based.⁵⁵ The execution of a written assignment is merely one means of effecting a transfer by one entity to another of the rights, title, and interest to a mortgage and note.⁵⁶ Another method of effecting an assignment—which requires no writing at all—is by the physical delivery of the mortgage and note to the assignee.⁵⁷ In such instances, the foreclosure plaintiff must establish physical possession of both the mortgage and note, and, according to the cases, the possession must precede the commencement of the litigation against the homeowner.⁵⁸

County Dec. 8, 2006); *LaSalle Bank Nat'l Ass'n v. Lamy*, No. 030049/2005, 2006 WL 2251721, at *2–3 (N.Y. Sup. Ct. Suffolk County Aug. 7, 2006). *But see Deutsche Bank Nat'l Trust Co. v. Pietranico*, 33 Misc. 3d 528, 549, 928 N.Y.S.2d 818, 833 (Sup. Ct. Suffolk County 2011) (holding that “[o]ne need not be both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced”; the intention of the parties to effectively transfer the note and mortgage is paramount so that the interest in the note, not actual ownership, that controls); *U.S. Bank, N.A. v. Flynn*, 27 Misc. 3d 802, 806, 897 N.Y.S.2d 855, 859 (Sup. Ct. Suffolk County 2010) (finding that, despite not being explicitly assigned the note and mortgage, the nominee of a lender is able to assign the mortgage and note); David D. Siegel, *To Foreclose, Owner of Mortgage Must Also Own Note*, 234 SIEGEL'S PRAC. REV. 3 (June 2011) (noting that requiring both the note and mortgage be transferred to confer upon an entity the right to foreclose further complicates an already complicated scene).

⁵² *Silverberg*, 86 A.D.3d at 282, 926 N.Y.S.2d at 538–39.

⁵³ *Id.* at 283, 926 N.Y.S.2d at 539 (noting that “MERS purportedly holds approximately 60 million mortgage loans” (citations omitted)).

⁵⁴ John Caher, *A.G. Sues Banks Over Their Use of MERS Electronic ‘End-Around’*, N.Y.L.J., Feb. 6, 2012, at 1.

⁵⁵ *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011).

⁵⁶ *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009).

⁵⁷ *Id.*

⁵⁸ *See id.* at 753, 754, 890 N.Y.S.2d at 580; *see also Stosel*, 89 A.D.3d at 888, 934 N.Y.S.2d at 183; *Deutsche Bank Nat'l Trust Co. v. Barnett*, 88 A.D.3d 636, 637, 931 N.Y.S.2d 630, 631 (App. Div. 2d Dep't 2011); *U.S. Bank Nat'l Ass'n v. Madero*, 80 A.D.3d 751, 752, 915 N.Y.S.2d 612, 613 (App. Div. 2d Dep't 2011); *U.S. Bank Nat'l Ass'n v. Pia*, 73 A.D.3d 752, 753, 901 N.Y.S.2d 104, 105 (App. Div. 2d Dep't 2010); *Fed. Nat'l Mortg. Ass'n v. Youkelsone*, 303 A.D.2d 546, 546–47, 755 N.Y.S.2d 730, 731 (App. Div. 2d Dep't 2003); *First Trust Nat'l Ass'n v. Meisels*, 234 A.D.2d 414, 414, 651 N.Y.S.2d 121, 122 (App. Div. 2d Dep't 1996); *HSBC Bank*

The foregoing discussion demonstrates that foreclosure plaintiffs must line up their documentation to establish their standing prior to the commencement of their actions. If physical possession of the mortgage and note is relied upon for standing, it is not sufficient for the foreclosure plaintiff to merely argue that it *has* both documents in its possession at the time the summary judgment motion is argued, but that it *had* both documents at the time the action was commenced and continues to possess them.⁵⁹ If a written assignment is relied upon, it must be fully executed as to both the mortgage *and* the note prior to commencement of the action.⁶⁰

B. Issues Peculiar to the Standing Defenses of Defendants

Plaintiffs are not the only parties to foreclosure actions that have encountered difficulties litigating the issue of standing, whether with regard to untimely assignments of notes and mortgages, or from failing to prove physical possession of notes and mortgages prior to the commencement of the actions. The defendants' difficulties appear to fall into two primary categories.

The first category is that CPLR section 3211(a)(3), by which defendants may contest the foreclosure plaintiffs' standing, is waived if not raised as an affirmative defense in their answers.⁶¹ An opinion by former Presiding Justice Gail Prudenti of the Appellate Division, Second Department, underscores the finality of a defendant's failure to raise the standing defense in an answer or

USA v. Hagerman, No. 130010/10, 2011 WL 6738703, at *3 (N.Y. Sup. Ct. Richmond County Dec. 1, 2011); Park Nat'l. Bank v. Lops, No. 21522-09, 2011 WL 4520555, at *2 (N.Y. Sup. Ct. Sept. 16, 2011); Citigroup Global Mkts. Realty Corp. v. Randolph Bowling, No. 12817/07, 2009 WL 4893940, at *2 (N.Y. Sup. Ct. Kings County Dec. 18, 2009).

⁵⁹ See *Barnett*, 88 A.D.3d at 638, 931 N.Y.S.2d at 632.

⁶⁰ See *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 210, 887 N.Y.S.2d 615, 619 (App. Div. 2d Dep't 2009); see also *Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867); *Stosel*, 89 A.D.3d at 888, 934 N.Y.S.2d at 183; *Barnett*, 88 A.D.3d at 637, 931 N.Y.S.2d at 631; *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011); *Madero*, 80 A.D.3d at 752–53, 915 N.Y.S.2d at 613; *Collymore*, 68 A.D.3d at 754, 890 N.Y.S.2d at 580; *Kluge v. Fugazy*, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep't 1988); *Flyer v. Sullivan*, 284 A.D. 697, 698, 134 N.Y.S.2d 521, 522 (App. Div. 1st Dep't 1954); *Beak v. Walts*, 266 A.D. 900, 900, 42 N.Y.S.2d 653, 653 (App. Div. 4th Dep't 1943) (per curiam); *Bank of Am., N.A. v. Kang*, No. 104587/10, 2011 WL 5295014, at *4 (N.Y. Sup. Ct. New York County Oct. 17, 2011); *Bank of N.Y. v. Mulligan*, No. 29399/07, 2010 WL 3339452, at *6 (N.Y. Sup. Ct. Kings County Aug. 25, 2010); *JP Morgan Chase Bank, N.A. v. George*, No. 10865/06, 2010 WL 1780952, at *3–4 (N.Y. Sup. Ct. Kings County May 4, 2010); *Deutsche Bank Nat'l Trust Co. v. Abbate*, No. 100893/07, 2009 WL 3384474, at *1, *3 (N.Y. Sup. Ct. Richmond County Oct. 6, 2009).

⁶¹ N.Y. C.P.L.R. 3211(e) (McKinney 2013).

pre-answer motion to dismiss.⁶² The opinion, *Wells Fargo Bank Minnesota, National Ass'n. v. Mastropaolo*, surveyed appellate cases holding that the standing defense is waived if not timely raised,⁶³ compared with other cases holding that the absence of standing is tantamount to the lack of subject matter jurisdiction and is not waivable.⁶⁴ Justice Prudenti's opinion sought to resolve the seeming inconsistency of the two lines of judicial reasoning.⁶⁵ The case was a residential mortgage foreclosure action, where the defendant homeowner served an answer to the plaintiff's complaint alleging five affirmative defenses.⁶⁶ The lack of standing was not included anywhere among the affirmative defenses.⁶⁷ The plaintiff bank thereafter filed a motion for summary judgment,⁶⁸ and in opposition to the motion, the defendant argued, for the first time, an absence of standing.⁶⁹ Specifically, the defendant's attorney argued in an affirmation that while the action had been commenced on June 17, 2005, the assignment of rights to the plaintiff did not occur until three days later, on June 20, 2005.⁷⁰ Predictably, the plaintiff argued in its reply submission that the defense of a lack of standing had been waived by virtue of the defendant's failure to affirmatively raise it in his answer.⁷¹ The Supreme Court, Richmond County denied the plaintiff bank summary judgment on the ground that it

⁶² *Wells Fargo Bank Minn., Nat'l Ass'n v. Mastropaolo*, 42 A.D.3d 239, 239, 837 N.Y.S.2d 247, 248 (App. Div. 2d Dep't 2007).

⁶³ *See id.* at 242–43, 837 N.Y.S.2d at 250 (citing *Fossella v. Dinkins*, 66 N.Y.2d 162, 167, 485 N.E.2d 1017, 1019, 495 N.Y.S.2d 352, 354 (1985); *Dougherty v. City of Rye*, 63 N.Y.2d 989, 991–92, 473 N.E.2d 249, 250–51, 483 N.Y.S.2d 999, 1001 (1984); *Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656, 657, 455 N.E.2d 483, 484, 467 N.Y.S.2d 830, 831 (1983); *Sec. Pac. Nat'l Bank v. Evans*, 31 A.D.3d 278, 278, 820 N.Y.S.2d 2, 3 (App. Div. 1st Dep't 2006); *Klein v. Garfinkle*, 12 A.D.3d 604, 605, 786 N.Y.S.2d 77, 78 (App. Div. 2d Dep't 2004); *Cont'l Capital Corp. v. Fiore*, 239 A.D.2d 381, 381, 658 N.Y.S.2d 889, 890 (App. Div. 2d Dep't 1997); *Gilman v. Abagnale*, 235 A.D.2d 989, 990, 653 N.Y.S.2d 176, 177 (App. Div. 3d Dep't 1997); *Nat'l Ass'n of Indep. Insurers v. State*, 207 A.D.2d 191, 197, 620 N.Y.S.2d 448, 452 (App. Div. 2d Dep't 1994), *aff'd*, 89 N.Y.2d 950, 678 N.E.2d 465, 655 N.Y.S.2d 853 (1997)).

⁶⁴ *See Mastropaolo*, 42 A.D.3d at 243, 837 N.Y.S.2d at 250 (citing *Stark v. Goldberg*, 297 A.D.2d 203, 204, 746 N.Y.S.2d 280, 281 (App. Div. 1st Dep't 2002); *Axelrod v. N.Y. State Teachers' Ret. Sys.*, 154 A.D.2d 827, 828, 546 N.Y.S.2d 489, 490 (App. Div. 3d Dep't 1989); *Eaton Assocs. v. Egan*, 142 A.D.2d 330, 334–35, 535 N.Y.S.2d 998, 1001 (App. Div. 3d Dep't 1988)). The reasoning of these cases "is that where there is no aggrieved party, there is no genuine controversy, and where there is no genuine controversy, there is no subject matter jurisdiction." *Mastropaolo*, 42 A.D.3d at 243, 837 N.Y.S.2d at 250 (citing *Evans*, 31 A.D.3d at 284, 820 N.Y.S.2d at 7 (Catterton, J., dissenting)).

⁶⁵ *Mastropaolo*, 42 A.D.3d at 243, 837 N.Y.S.2d at 250.

⁶⁶ *See id.* at 240, 837 N.Y.S.2d at 248.

⁶⁷ *Id.*

⁶⁸ *Id.* at 240, 837 N.Y.S.2d at 248.

⁶⁹ *Id.* at 241, 837 N.Y.S.2d at 249.

⁷⁰ *Id.*

⁷¹ *Id.*

had lacked standing, and despite the absence of a cross-motion, searched the record and dismissed the complaint with prejudice.⁷²

In her opinion, Justice Prudenti determined that since the supreme court in New York State “is a court of general jurisdiction,” it may “entertain all causes of action unless” the power to do so in a given instance is “specifically proscribed.”⁷³ In fact, subject matter jurisdiction involves the power of the court to decide a question and is never dependent upon the facts that may appear in any particular cases.⁷⁴ The absence of power to entertain an action speaks to its lack of subject matter jurisdiction, whereas the absence of power to reach a party’s merits does not.⁷⁵ Thus, Justice Prudenti reasoned, a party’s lack of standing does not implicate the court’s subject matter jurisdiction and is a defense that a defendant party waives.⁷⁶ As a result, the Second Department in *Mastrapaolo* reversed the order of the supreme court that was appealed from, and granted summary judgment to the bank insofar as it established its *prima facie* entitlement to the requested relief and the defendant homeowner failed to raise a non-waived triable issue of fact in opposition.⁷⁷ As a result of this opinion, any ambiguity that might have existed as to whether the lack of standing is waived by a defendant if not timely raised in an answer or pre-answer motion to dismiss has been conclusively resolved: defendants must use the defense, or lose it.

A second category of actions where defendants have difficulty raising an effective standing defense is where the defendants have failed to appear and answer the plaintiffs’ complaint, resulting in default judgments against them.⁷⁸ Any defendant that remains in

⁷² *Id.*

⁷³ *Id.* at 244, 837 N.Y.S.2d at 251 (quoting *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 166, 225 N.E.2d 503, 506, 278 N.Y.S.2d 793, 798 (1967)).

⁷⁴ *Thrasher*, 19 N.Y.2d at 166, 225 N.E.2d at 506, 278 N.Y.S.2d at 798.

⁷⁵ *See Mastropaolo*, 42 A.D.3d at 244, 837 N.Y.S.2d at 251 (citing *Lacks v. Lacks*, 41 N.Y.2d 71, 75, 359 N.E.2d 384, 387, 390 N.Y.S.2d 875, 877–78 (1976)).

⁷⁶ *See Mastropaolo*, 42 A.D.3d at 244, 837 N.Y.S.2d at 251. *See also* *Countrywide Home Loans, Inc. v. Delphonse*, 64 A.D.3d 624, 625, 883 N.Y.S.2d 135, 136 (App. Div. 2d Dep’t 2009); *Congel v. Malfitano*, 61 A.D.3d 807, 809, 877 N.Y.S.2d 443, 446 (App. Div. 2d Dep’t 2009); *Otufale v. Whetstone*, No. 570456/08, 2010 WL 118225, at *1 (N.Y. Sup. App. Term 1st Dep’t Jan. 13, 2010); *EMC Mortg. Corp. v. Carlo*, No. 103571/08, 2011 WL 6738658, at *5 (N.Y. Sup. Ct. Richmond County Sept. 13, 2011); *Deutsche Bank Nat’l Trust Co. v. Pietranico*, 33 Misc. 3d 528, 534, 535, 928 N.Y.S.2d 818, 823 (Sup. Ct. Suffolk County 2011); *Citimortgage, Inc. v. Rosenthal*, No. 7123/2008, 2010 WL 8333870, at *1–2 (N.Y. Sup. Ct. Rockland County Aug. 12, 2010); *Wash. Mut. Bank v. Payne*, No. 31557-02, 2009 WL 1708134, at *2 (N.Y. Sup. Ct. Suffolk County June 15, 2009).

⁷⁷ *Mastropaolo*, 42 A.D.3d at 245, 837 N.Y.S.2d at 252.

⁷⁸ *See, e.g., Smolinski v. Smolinski*, 13 A.D.3d 1188, 1189, 786 N.Y.S.2d 881 (App. Div. 4th Dep’t 2004) (quoting *Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197, 198–99 (App.

default, of course, has no forum for contesting the plaintiff's standing.⁷⁹ In many instances, foreclosure defendants will seek to vacate default judgments rendered against them by serving motions pursuant to CPLR section 5015(a)(1),⁸⁰ section 5015(a)(4),⁸¹ or section 317.⁸² There are subtle, yet significant, differences between the forms of CPLR section 5015 and section 317 motions.⁸³ Under CPLR section 5015(a)(4), defendants may generally obtain a vacatur of default judgments by establishing that there was a lack of personal jurisdiction over them in the first instance.⁸⁴ There is no time limit for such motions, as the absence of jurisdiction over the defendant, from the failure or inadequacy of service of process, is timeless.⁸⁵ On occasions, defaults are not vacated where the moving defendant makes mere conclusory or unsubstantiated allegations about the absence of proper service.⁸⁶ On other occasions, framed-

Div. 2d Dep't 2003) ("A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer.") (other citations omitted).

⁷⁹ See, e.g., *Mastropaolo*, 42 A.D.3d at 241–42, 837 N.Y.S.2d at 249 (holding that defendant must raise the issue of standing or waive its objection to the issue). See also David D. Siegel, *Practice Commentaries*, C5015:1, in N.Y. C.P.L.R. 5015 (McKinney 2013) (stating that a defendant overcome a default judgment against them in one of four main ways); Vincent C. Alexander, *Practice Commentaries*, C317:1, in N.Y. C.P.L.R. 317 (McKinney 2013) (stating the four requirements a defendant must show in order to vacate a default judgment under CPLR section 317). Without succeeding in overcoming a default judgment, the defendant will have no claim to make against the plaintiff anyways.

⁸⁰ See C.P.L.R. 5015(a)(1) (discussing excusable default and the statute of limitations for seeking vacatur).

⁸¹ See C.P.L.R. 5015(a)(4) (discussing lack of jurisdiction as a means to vacate a default judgment).

⁸² See C.P.L.R. 317 (addressing four requirements for a defendant to meet in order to overcome a default judgment against them).

⁸³ See David D. Siegel, *Practice Commentaries*, C5015:6, in C.P.L.R. 5015 (discussing the differences between CPLR sections 317 and 5015(a)).

⁸⁴ See, e.g., *Ramirez v. Romualdo*, 25 A.D.3d 680, 680, 808 N.Y.S.2d 733, 734 (App. Div. 2d Dep't 2006); *Smith v. Smith*, 291 A.D.2d 828, 828, 736 N.Y.S.2d 557, 558 (App. Div. 4th Dep't 2002); *Antalek v. Elliott*, 26 A.D.2d 716, 716, 271 N.Y.S.2d 746, 747 (App. Div. 3d Dep't 1966); *Citibank (S.D.) v. Farmer*, 166 Misc. 2d 145, 146, 147, 631 N.Y.S.2d 800, 801 (Mt. Vernon City Ct. 1995).

⁸⁵ See David D. Siegel, *Practice Commentaries*, C5015:3, in C.P.L.R. 5015 (stating that a defense based upon lack of jurisdiction has no time limit in CPLR section 5015).

⁸⁶ See, e.g., *Deutsche Bank Nat'l Trust Co. v. Dixon*, 93 A.D.3d 630, 630, 939 N.Y.S.2d 705, 706 (App. Div. 2d Dep't 2012) (holding that a conclusory denial of receipt of commons and complaint was insufficient to rebut a process server's affidavit of service, establishing personal jurisdiction); *Irwin Mortg. Corp. v. Devis*, 72 A.D.3d 743, 743, 898 N.Y.S.2d 854, 854 (App. Div. 2d Dep't 2010) (same); *SFR Funding, Inc. v. Studio Fifty Corp.*, 36 A.D.3d 604, 605, 829 N.Y.S.2d 137, 138 (App. Div. 2d Dep't 2007) (finding that the defendants failed to show grounds for vacating default judgment for lack of personal jurisdiction where personal service was undisputed); see also *Bank of N.Y. v. Espejo*, 92 A.D.3d 707, 708, 939 N.Y.S.2d 105, 106–07 (App. Div. 2d Dep't 2012) (noting that service to a "suitable" person on behalf of a co-

issue “traverse” hearings are required to resolve the question of whether service was properly effected upon the defendant where there is a sworn denial of service accompanied by non-conclusory facts.⁸⁷

tenant who received service did not reside at the subject property valid); *Clover M. Barrett, P.C. v. Gordon*, 90 A.D.3d 973, 973–74, 936 N.Y.S.2d 217, 218 (App. Div. 2d Dep’t 2011) (finding that the default judgment was valid where the defendant failed to prove that she was not personally served); *U.S. Nat’l Bank Ass’n v. Melton*, 90 A.D.3d 742, 743, 934 N.Y.S.2d 352, 353 (App. Div. 2d Dep’t 2011) (noting that a conclusory denial of receipt of summons and complaint was insufficient to vacate default judgment); *Gottesman v. Friedman*, 90 A.D.3d 608, 609, 934 N.Y.S.2d 436, 437 (App. Div. 2d Dep’t 2011) (positing that unsubstantiated denials insufficient to rebut presumption of proper service, which the plaintiff established at hearing through two affidavits of service and other evidence); *In re Foreclosure of Tax Liens by Schuyler*, 83 A.D.3d 1243, 1246, 921 N.Y.S.2d 376, 380 (App. Div. 3d Dep’t), *appeal dismissed*, 17 N.Y.3d 850, 850, 954 N.E.2d 1171, 1171, 930 N.Y.S.2d 545, 545 (2011) (finding that the court was not persuaded by conclusory allegations that the respondent’s agent provided a “dark haired woman” with a forwarding address in their denial of service); *Citimortgage, Inc. v. Phillips*, 82 A.D.3d 1032, 1033, 918 N.Y.S.2d 893, 893 (App. Div. 2d Dep’t 2011) (holding that the defendant’s unsubstantiated denials were insufficient to rebut presumption of proper service); *U.S. Consults v. APG, Inc.*, 82 A.D.3d 753, 753, 917 N.Y.S.2d 911, 912 (App. Div. 2d Dep’t 2011) (same); *Admiral Ins. Co. v. Marriott Int’l, Inc.*, 79 A.D.3d 572, 572, 915 N.Y.S.2d 31, 32 (App. Div. 1st Dep’t 2010) (positing that an unsubstantiated claim of a law office failure is not a reasonable excuse giving rise to vacating a default judgment); *C & H Import & Export v. MNA Global*, 79 A.D.3d 784, 785, 912 N.Y.S.2d 428, 428 (App. Div. 2d Dep’t 2010) (holding that a defendant’s unsubstantiated denials insufficient to rebut the presumption of proper service on a motion to vacate a default judgment); *Deutsche Bank Nat’l Trust Co. v. Hussain*, 78 A.D.3d 989, 989, 912 N.Y.S.2d 595, 595–96 (App. Div. 2d Dep’t 2010) (holding that a defendant’s unsubstantiated denial was insufficient to rebut presumption of proper service and conclusory denial insufficient to require a hearing on validity of service on motion to vacate default judgment); *Valiotis v. Psaroudis*, 78 A.D.3d 683, 684, 911 N.Y.S.2d 111, 112 (App. Div. 2d Dep’t 2010) (holding that a defendant’s unsubstantiated denial was insufficient to rebut the presumption of proper service); *Prospect Park Mgmt., LLC v. Beatty*, 73 A.D.3d 885, 886, 900 N.Y.S.2d 433, 435 (App. Div. 2d Dep’t 2010) (same); *Pezolano v. Inc. Glen Cove*, 71 A.D.3d 970, 971, 896 N.Y.S.2d 685, 685 (App. Div. 2d Dep’t 2010) (same); *Sturino v. Nino Tripicchio & Son Landscaping*, 65 A.D.3d 1327, 1327, 885 N.Y.S.2d 625, 626 (App. Div. 2d Dep’t 2009) (holding that the defendant’s motion to vacate a default judgment was properly denied where the defendant did not submit an affidavit challenging the validity of service); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 A.D.3d 984, 984, 875 N.Y.S.2d 815, 816 (App. Div. 2d Dep’t 2009) (finding that a defendant’s unsubstantiated denial was insufficient to rebut the presumption of proper service); *Feldman v. Feldman*, 54 A.D.3d 372, 373, 863 N.Y.S.2d 69, 70 (App. Div. 2d Dep’t 2008) (noting that there was no evidentiary support for the conclusory assertion that the deadline for service in a proceeding for visitation was extended); *Belmore-Gaillard v. Gaillard*, 51 A.D.3d 603, 603, 859 N.Y.S.2d 68, 69 (App. Div. 1st Dep’t 2008) (rejecting the plaintiff’s conclusory and unsupported claim that she never received service of process); *Zapata-DeJesus v. Zapata*, 50 A.D.3d 1131, 1131, 857 N.Y.S.2d 612, 612 (App. Div. 2d Dep’t 2008) (holding that the defendant’s conclusory denial of service was insufficient to require a hearing on validity); *Mortg. Elec. Registration Sys. v. Schotter*, 50 A.D.3d 983, 983, 857 N.Y.S.2d 592, 594 (App. Div. 2d Dep’t 2008) (holding that the defendant’s conclusory allegations were insufficient to rebut presumption of proper service); *Francis v. Francis*, 48 A.D.3d 512, 512, 852 N.Y.S.2d 259, 260 (App. Div. 2d Dep’t 2008) (same).

⁸⁷ *E.g.*, *Wells Fargo Bank, N.A. v. Christie*, 83 A.D.3d 824, 825, 921 N.Y.S.2d 127, 128 (App. Div. 2d Dep’t 2011); *Deutsche Bank Nat’l Trust Co. v. Pestano*, 71 A.D.3d 1074, 1074–75, 899 N.Y.S.2d 269, 270 (App. Div. 2d Dep’t 2010); *Wells Fargo Bank, N.A. v. Chaplin*, 65

By contrast, motions to vacate default judgments under CPLR section 5015(a)(1) involve a two-pronged test; namely, the establishment of an excusable default⁸⁸ and the existence of a meritorious defense.⁸⁹ The grant or denial of the vacatur motion is

A.D.3d 588, 589, 884 N.Y.S.2d 254, 255 (App. Div. 2d Dep't 2009); *Mortg. Access Corp. v. Webb*, 11 A.D.3d 592, 593, 784 N.Y.S.2d 116, 117 (App. Div. 2d Dep't 2004); *Bankers Trust of Cal., N.A. v. Tsoukas*, 303 A.D.2d 343, 344, 756 N.Y.S.2d 92, 94 (App. Div. 2d Dep't 2003); *Kingsland Grp., Inc. v. Pose*, 296 A.D.2d 440, 440–41, 744 N.Y.S.2d 715, 716 (App. Div. 2d Dep't 2002); *Balancio v. Santorelli*, 267 A.D.2d 189, 189, 699 N.Y.S.2d 312, 312 (App. Div. 2d Dep't 1999); *Jannace v. Nelson, L.P.*, 256 A.D.2d 385, 385, 681 N.Y.S.2d 591, 592 (App. Div. 2d Dep't 1998); *New Island Investors v. Wynne*, 251 A.D.2d 560, 561, 674 N.Y.S.2d 593, 593 (App. Div. 2d Dep't 1998); *Bank of America Nat'l Trust & Sav. Ass'n v. Herrick*, 233 A.D.2d 351, 352, 650 N.Y.S.2d 754, 755 (App. Div. 2d Dep't 1996); *Dime Sav. Bank of N.Y. v. Steinman*, 206 A.D.2d 404, 405, 613 N.Y.S.2d 945, 946 (App. Div. 2d Dep't 1994); *Frankel v. Schilling*, 149 A.D.2d 657, 659, 540 N.Y.S.2d 469, 471 (App. Div. 2d Dep't 1989); *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 139–40, 502 N.Y.S.2d 479, 483, 484 (App. Div. 2d Dep't 1986); *Potenza Contracting Corp. v. Pizzond*, 39 A.D.2d 555, 555, 331 N.Y.S.2d 895, 895 (App. Div. 2d Dep't 1972).

⁸⁸ C.P.L.R. 5015(a)(1). There are numerous cases that considered vacating default judgments under the excusable default prong. *See, e.g.*, *Peña v. N.Y. City Hous. Auth.*, 91 A.D.3d 581, 582, 936 N.Y.S.2d 891, 891 (App. Div. 1st Dep't 2012); *2261 Palmer Ave. Corp. v. Malick*, 91 A.D.3d 853, 853, 936 N.Y.S.2d 672, 673 (App. Div. 2d Dep't 2012); *Yearwood v. Post Park, LLC*, 91 A.D.3d 766, 767, 936 N.Y.S.2d 893, 894 (App. Div. 2d Dep't 2012); *Deutsche Bank Nat'l Trust Co. v. Luden*, 91 A.D.3d 701, 701, 936 N.Y.S.2d 561, 561 (App. Div. 2d Dep't 2012); *Zaidman v. Zaidman*, 90 A.D.3d 1035, 1037, 935 N.Y.S.2d 147, 149 (App. Div. 2d Dep't 2011); *Walker v. Mohammed*, 90 A.D.3d 1034, 1034, 934 N.Y.S.2d 854, 855 (App. Div. 2d Dep't 2011); *Miller v. Mack*, 90 A.D.3d 1003, 1003, 934 N.Y.S. 841, 842 (App. Div. 2d Dep't 2011); *Melton*, 90 A.D.3d at 744, 934 N.Y.S.2d at 353; *Bazoyah v. Herschitz*, 79 A.D.3d 1081, 1081–82, 913 N.Y.S.2d 769, 770 (App. Div. 2d Dep't 2010); *Tribecca Lending Corp. v. Crawford*, 79 A.D.3d 1018, 1020, 916 N.Y.S.2d 116, 118 (App. Div. 2d Dep't 2010); *Baez v. Ende Realty Corp.*, 78 A.D.3d 576, 576, 911 N.Y.S.2d 68, 68–69 (App. Div. 1st Dep't 2010); *N.Y. Cmty. Bank v. Vermonty*, 68 A.D.3d 1074, 1076, 892 N.Y.S.2d 137, 139 (App. Div. 2d Dep't 2009); *Wash. Mut. Bank v. Fisette*, 66 A.D.3d 1287, 1288, 887 N.Y.S.2d 728, 729 (App. Div. 3d Dep't 2009); *Jones v. 414 Equities LLC*, 57 A.D.3d 65, 81, 866 N.Y.S.2d 165, 177 (App. Div. 1st Dep't 2008); *Apple Bank v. Fort Tryon Apartments Corp.*, 44 A.D.3d 497, 498, 843 N.Y.S.2d 307, 308 (App. Div. 1st Dep't 2007); *State v. Williams*, 44 A.D.3d 1149, 1151, 843 N.Y.S.2d 722, 724 (App. Div. 3d Dep't 2007); *St. Vincent's Hosp. & Med. Ctr. v. Allstate Ins. Co.*, 42 A.D.3d 525, 525, 838 N.Y.S.2d 917, 917 (App. Div. 2d Dep't 2007); *Knupfer v. Hertz Corp.*, 35 A.D.3d 1237, 1238, 827 N.Y.S.2d 394, 394 (App. Div. 4th Dep't 2006); *Nilt, Inc. v. N.Y. State Dep't of Motor Vehicles*, 35 A.D.3d 937, 938, 826 N.Y.S.2d 471, 472 (App. Div. 3d Dep't 2006); *Wilson v. Sherman Terrace Coop., Inc.*, 14 A.D.3d 367, 368, 787 N.Y.S.2d 318, 319 (App. Div. 1st Dep't 2005); *Heskel's W. 38th St. Corp. v. Gotham Constr. Co.*, 14 A.D.3d 306, 307, 787 N.Y.S.2d 285, 287 (App. Div. 1st Dep't 2005); *Smolinski v. Smolinski*, 13 A.D.3d 1188, 1189, 786 N.Y.S.2d 881, 881 (App. Div. 4th Dep't 2004); *Taylor v. Saal*, 4 A.D.3d 467, 467, 771 N.Y.S.2d 671, 672 (App. Div. 2d Dep't 2004); *Dominguez v. Carioscia*, 1 A.D.3d 396, 397, 766 N.Y.S.2d 685, 686 (App. Div. 2d Dep't 2003); *Sanford v. 27–29 W. 181st St. Ass'n*, 300 A.D.2d 250, 250, 753 N.Y.S.2d 49, 50 (App. Div. 1st Dep't 2002); *Vassallo v. San Realty Corp.*, 752 N.Y.S.2d 888, 889 (App. Div. 2d Dep't 2002).

⁸⁹ There are numerous cases that considered vacating default judgments under the meritorious defense prong. *See, e.g.*, *Rich Town Realty, Inc. v. Kim's Int'l, Inc.*, 91 A.D.3d 563, 563, 936 N.Y.S.2d 889, 889 (App. Div. 1st Dep't 2012); *Luden*, 91 A.D.3d at 702, 936 N.Y.S.2d at 562; *Fremont Inv. & Loan v. Bertram*, 90 A.D.3d 988, 988, 934 N.Y.S.2d 822, 822 (App. Div. 2d Dep't 2011); *Bank of Am. v. Faracco*, 89 A.D.3d 879, 879–80, 932 N.Y.S.2d 706, 706–07 (App. Div. 2d Dep't 2011); *Bank of N.Y. v. Resles*, 78 A.D.3d 469, 470, 472, 912

ultimately a matter of the trial court's discretion,⁹⁰ and the standard of review on appeal is whether that discretion was exercised improvidently.⁹¹ These motions are subject to a strict one-

N.Y.S.2d 35, 36, 38 (App. Div. 1st Dep't 2010); *Emigrant Mortg. Co. v. Teel*, 74 A.D.3d 1275, 1276, 903 N.Y.S.2d 250, 251 (App. Div. 2d Dep't 2010); *U.S. Bank, N.A. v. Dick*, 67 A.D.3d 900, 902, 889 N.Y.S.2d 223, 224–25 (App. Div. 2d Dep't 2009); *Girardo v. 99-27 Realty, LLC*, 62 A.D.3d 659, 660, 878 N.Y.S.2d 401, 402 (App. Div. 2d Dep't 2009); *Maines Paper & Food Serv., Inc. v. Boulevard Burgers Corp.*, 52 A.D.3d 1150, 1152, 861 N.Y.S.2d 808, 810 (App. Div. 3d Dep't 2008); *Fladell v. Am. Red Magen David for Isr.*, 44 A.D.3d 897, 897, 844 N.Y.S.2d 136, 137 (App. Div. 2d Dep't 2007); *St. Vincent's Hosp. & Med. Ctr.*, 42 A.D.3d at 525, 838 N.Y.S.2d at 917; *Vargas v. Ahmed*, 41 A.D.3d 328, 329, 837 N.Y.S.2d 654, 655 (App. Div. 1st Dep't 2007); *QRT Assocs. v. Mouzouris*, 40 A.D.3d 326, 326, 836 N.Y.S.2d 62, 63 (App. Div. 1st Dep't 2007); *Bollino v. Hitzig*, 34 A.D.3d 711, 711, 825 N.Y.S.2d 511, 512 (App. Div. 2d Dep't 2006); *Rubensbauer v. Mekelburg*, 22 A.D.3d 826, 827, 803 N.Y.S.2d 183, 184 (App. Div. 2d Dep't 2005); *Alaska Seaboard Partners Ltd. P'ship v. Grant*, 20 A.D.3d 436, 437, 799 N.Y.S.2d 117, 118 (App. Div. 2d Dep't 2005); *Compass Grp., USA, Inc. v. Mazula*, 18 A.D.3d 1094, 1095, 795 N.Y.S.2d 395, 397 (App. Div. 3d Dep't 2005); *Dodge v. Commander*, 18 A.D.3d 943, 945, 794 N.Y.S.2d 482, 484 (App. Div. 3d Dep't 2005); *Wilson v. Sherman Terrace Coop.*, 14 A.D.3d 367, 368, 787 N.Y.S.2d 318, 319 (App. Div. 1st Dep't 2005); *Merrill/N.Y. Co. v. Celerity Sys., Inc.*, 300 A.D.2d 206, 206, 752 N.Y.S.2d 301, 301 (App. Div. 1st Dep't 2002); *Vassallo*, 752 N.Y.S.2d at 889; *Barton v. Exec. Health Exam'rs*, 277 A.D.2d 27, 28, 716 N.Y.S.2d 3, 4 (App. Div. 1st Dep't 2000).

⁹⁰ See, e.g., *Hurston v. Southlea*, 91 A.D.3d 952, 953, 937 N.Y.S.2d 607, 608 (App. Div. 2d Dep't 2012) (other citations omitted) (quoting *In re Cassidy Sue R.*, 58 A.D.3d 744, 745, 870 N.Y.S.2d 799, 799 (App. Div. 2d Dep't 2009) (discussing court discretion in the context of vacating family court orders); *Walker v. Mohammed*, 90 A.D.3d 1034, 1034, 934 N.Y.S.2d 854, 855 (App. Div. 2d Dep't 2011); *Centennial Elevator Indus., Inc. v. Ninety-Five Madison Corp.*, 90 A.D.3d 689, 689, 934 N.Y.S.2d 483, 484 (App. Div. 2d Dep't 2011); *Morales v. Marma*, 88 A.D.3d 722, 722, 930 N.Y.S.2d 629, 630 (App. Div. 2d Dep't 2011); *Kohn v. Kohn*, 86 A.D.3d 630, 630, 928 N.Y.S.2d 55, 56 (App. Div. 2d Dep't 2011); *Dimitriadis v. Visiting Nurse Serv. of N.Y.*, 84 A.D.3d 1150, 1150, 923 N.Y.S.2d 691, 691 (App. Div. 2d Dep't 2011); *Davis v. Davis*, 84 A.D.3d 1080, 1081, 923 N.Y.S.2d 633, 634 (App. Div. 2d Dep't 2011); *Lane v. Smith*, 84 A.D.3d 746, 747–48, 922 N.Y.S.2d 214, 216 (App. Div. 2d Dep't 2011); *Chevalier v. 368 E. 148th St. Assocs., LLC*, 80 A.D.3d 411, 413, 914 N.Y.S.2d 130, 132 (App. Div. 1st Dep't 2011); *Kushner v. Mendenhall*, 79 A.D.3d 883, 883, 912 N.Y.S.2d 439, 440 (App. Div. 2d Dep't 2010); *Kasumu v. City of N.Y.*, 78 A.D.3d 560, 560, 911 N.Y.S.2d 61, 62 (App. Div. 1st Dep't 2010); *Proctor-Shields v. Shields*, 74 A.D.3d 1347, 1348, 904 N.Y.S.2d 183, 184 (App. Div. 2d Dep't 2010); *Alberton Developers, Inc. v. All Trade Enters., Inc.* 74 A.D.3d 1000, 1000, 902 N.Y.S.2d 403, 404 (App. Div. 2d Dep't 2010); *Khanal v. Sheldon*, 74 A.D.3d 894, 895–96, 904 N.Y.S.2d 453, 454 (App. Div. 2d Dep't 2010); *Scala v. 4020 Jerusalem Owners, Inc.*, 72 A.D.3d 926, 927, 898 N.Y.S.2d 661, 662 (App. Div. 2d Dep't 2010).

⁹¹ See, e.g., *Gutman v. A to Z Holding Corp.*, 91 A.D.3d 718, 719, 936 N.Y.S.2d 316, 318 (App. Div. 2d Dep't 2012); *Luden*, 91 A.D.3d at 702, 936 N.Y.S.2d at 562; *Toll Bros., Inc. v. Dorsch*, 91 A.D.3d 755, 756, 936 N.Y.S.2d 576, 577 (App. Div. 2d Dep't 2012); *Zaidman*, 90 A.D.3d at 1037, 935 N.Y.S.2d at 149; *Bank of Am. v. Faracco*, 89 A.D.3d 879, 879–80, 932 N.Y.S.2d 706, 707 (App. Div. 2d Dep't 2011); *Dervisevic v. Dervisevic*, 89 A.D.3d 785, 786, 932 N.Y.S.2d 347, 348 (App. Div. 2d Dep't 2011); *Pursoo v. Ngala-El*, 89 A.D.3d 712, 713, 931 N.Y.S.2d 914, 914 (App. Div. 2d Dep't 2011); *Biton v. Turco*, 88 A.D.3d 519, 519, 930 N.Y.S.2d 876, 877 (App. Div. 1st Dep't 2011); *Berardo v. Guillet*, 86 A.D.3d 459, 459, 926 N.Y.S.2d 521, 521 (App. Div. 1st Dep't 2011); *Private Capital Grp., LLC v. Hosseinipour*, 86 A.D.3d 554, 556, 927 N.Y.S.2d 665, 668 (App. Div. 2d Dep't 2011); *Lueders v. Boma-Lueders*, 85 A.D.3d 1130, 1131, 927 N.Y.S.2d 118, 119 (App. Div. 2d Dep't 2011); *Castro v. A&P Suffolk Limo*, 84 A.D.3d 1142, 1143, 923 N.Y.S.2d 352, 353 (App. Div. 2d Dep't 2011); *Remote Meter Techn. of N.Y. v. Aris Realty Corp.*, 83 A.D.3d 1030, 1032, 922 N.Y.S.2d 440, 442 (App. Div. 2d Dep't 2011); *Osman v. Osman*, 83 A.D.3d 1022, 1023, 922 N.Y.S.2d 449, 451 (App. Div. 2d Dep't

year time limit measured from the date of service upon the defendant of a copy of the judgment or upon written notice of its entry.⁹²

The vacatur of default judgments under CPLR section 317 is applicable only where service of process was affected by a means other than personal delivery or by service upon the defendant's designated agent.⁹³ Where service was accomplished by a means other than personal service or by service upon an agent, the defendant seeking vacatur must merely establish the existence of a meritorious defense.⁹⁴ The statute places a time limit upon the defendant, however. Motions under this statute must be brought within one year of the date that the defendant obtained knowledge of the entry of the judgment, but in no event beyond five years from its entry.⁹⁵ As with vacatur motions under CPLR section 5015, the grant or denial of CPLR section 317 applications is left to the sound discretion of the trial courts.⁹⁶

The reason that the vacatur of default judgments transects the

2011); DaimlerChrysler Ins. Co. v. Seck, 82 A.D.3d 581, 582, 919 N.Y.S.2d 20, 20 (App. Div. 1st Dep't 2011); Yusupova v. Lampropoulos, 18 A.D.3d 466, 467, 793 N.Y.S.2d 768, 769 (App. Div. 2d Dep't 2005); Billings v. Rao, 172 A.D.2d 472, 473, 567 N.Y.S.2d 827, 828 (App. Div. 2d Dep't 1991).

⁹² C.P.L.R. 5015(a)(1); Rockland Bakery v. B.M. Baking Co., 83 A.D.3d 1080, 1082, 923 N.Y.S.2d 572, 574 (App. Div. 2d Dep't 2011); Pricher v. City of N.Y., 251 A.D.2d 242, 242, 674 N.Y.S.2d 674, 674 (App. Div. 1st Dep't 1998); John Sexton & Co. v. Law Foods, Inc., 108 A.D.2d 785, 786, 485 N.Y.S.2d 115, 117 (App. Div. 2d Dep't), *appeal and motion dismissed*, 65 N.Y.2d 1055, 494 N.Y.S.2d 304 (1985); see Worthy v. Ramos, 23 A.D.3d 460, 461, 808 N.Y.S.2d 94, 95 (App. Div. 2d Dep't 2005).

⁹³ See N.Y. C.P.L.R. 317 (McKinney 2013).

⁹⁴ *Id.*; see also Jackson v. Prof'l Transp. Corp., 81 A.D.3d 602, 603, 916 N.Y.S.2d 159, 161 (App. Div. 2d Dep't 2011); Shanker v. 119 E. 30th, Ltd., 63 A.D.3d 553, 554, 881 N.Y.S.2d 98, 99 (App. Div. 1st Dep't 2009); Ferguson v. Shu Ham Lam, 59 A.D.3d 387, 388, 872 N.Y.S.2d 529, 530 (App. Div. 2d Dep't 2009); Fatima v. Twenty Seven-Twenty Four Realty Corp., 53 A.D.3d 564, 564, 861 N.Y.S.2d 768, 768 (App. Div. 2d Dep't 2008); Balchunas v. Alitalia-Linee Aeree Italiane-Societa Per Azioni, 40 A.D.3d 789, 790, 836 N.Y.S.2d 647, 648 (App. Div. 2d Dep't 2007); Franklin v. 172 Aububon Corp., 32 A.D.3d 454, 455, 819 N.Y.S.2d 785, 786 (App. Div. 2d Dep't 2006); Lo v. Gong Park Realty Corp., 16 A.D. 553, 553, 792 N.Y.S.2d 145, 146 (App. Div. 2d Dep't 2005); Persaud v. Gallante Props., Inc., 11 A.D.3d 442, 442, 782 N.Y.S.2d 762, 763 (App. Div. 2d Dep't 2004); Foster v. Jordan, 269 A.D.2d 152, 153, 703 N.Y.S.2d 23, 25 (App. Div. 1st Dep't 2000); Concepcion v. Talon Realty Corp., 258 A.D.2d 494, 494, 684 N.Y.S.2d 631, 631 (App. Div. 2d Dep't 1999); Larman v. Russel, 240 A.D.2d 473, 474, 659 N.Y.S.2d 782, 783 (App. Div. 2d Dep't 1997); Union Indem. Ins. Co. of N.Y. v. 10-01 50th Ave. Realty Corp., 102 A.D.2d 727, 728, 476 N.Y.S.2d 563, 565 (App. Div. 1st Dep't 1984).

⁹⁵ C.P.L.R. 317.

⁹⁶ Rios v. Starrett City, Inc., 31 A.D.3d 418, 418, 818 N.Y.S.2d 526, 527 (App. Div. 2d Dep't 2006); see Girardo v. 99-27 Realty, LLC, 62 A.D.3d 659, 660, 878 N.Y.S.2d 401, 402 (App. Div. 2d Dep't 2009); Malik v. Noe, 54 A.D.3d 733, 734, 864 N.Y.S.2d 82, 84 (App. Div. 2d Dep't 2008); Calderon v. 163 Ocean Tenants Corp., 27 A.D.3d 410, 410, 811 N.Y.S.2d 428, 429 (App. Div. 2d Dep't 2006); Brockington v. Brookfield Dev. Corp., 308 A.D.2d 498, 498, 764 N.Y.S.2d 469, 470 (App. Div. 2d Dep't 2003).

issue of standing is that, on some occasions, the meritorious defense that foreclosure defendants wish to argue under CPLR section 5015(a)(1) or CPLR section 317 is the plaintiffs' alleged lack of standing.⁹⁷ However, as also noted, a standing defense is waived under CPLR section 3211(e) if not affirmatively raised by defendants' in their answers or pre-answer motions to dismiss.⁹⁸ Thus, CPLR section 5015(a)(1) and CPLR section 317 are at loggerheads with CPLR section 3211(e), with the two vacatur statutes inviting defendants to raise meritorious defenses (such as the plaintiffs' lack of standing) while CPLR section 3211(e) treats the same defense as waived by virtue of the defendants' default.⁹⁹ Presiding Justice Prudenti's opinion in *Wells Fargo Bank Minnesota National Ass'n v. Mastropaolo* did not involve a circumstance where the defendant homeowner had defaulted in answering the plaintiff's complaint, and therefore, the opinion did not reach the issue of whether a lack of standing can be successfully raised as a defendant's "meritorious defense" when moving to vacate a default judgment under CPLR section 5015(a)(1) or CPLR section 317.¹⁰⁰

A later decision from the Second Department specifically addressed the standing/default issue that *Mastropaolo* did not reach.¹⁰¹ In *HSBC Bank, USA v. Dammond*, an appellate panel, relying upon the reasoning of *Mastrapaolo*, held that since the defendant homeowners had not asserted a lack of standing affirmative defense in any answer or pre-answer motion, by virtue of their default in failing to appear and answer, the defense was waived.¹⁰² The Second Department concluded that the defendants had failed to proffer a non-waived meritorious defense to the plaintiff's action, and therefore, the plaintiff was entitled to keep its default judgment despite an apparent lack of standing.¹⁰³

The result reached in *HSBC Bank, USA v. Dammond* is

⁹⁷ See, e.g., *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 277, 926 N.Y.S.2d 532, 535 (App. Div. 2d Dep't 2011); *U.S. Bank Nat'l Ass'n v. Madero*, 80 A.D.3d 751, 752, 915 N.Y.S.2d 612, 613 (App. Div. 2d Dep't 2011); *Lasalle Bank Nat'l Ass'n v. Ahearn*, 59 A.D.3d 911, 911, 875 N.Y.S.2d 595, 596 (App. Div. 3d Dep't 2009).

⁹⁸ N.Y. C.P.L.R. 3211(e) (McKinney 2013).

⁹⁹ See C.P.L.R. 317; C.P.L.R. 3211(e); N.Y. C.P.L.R. 5015(a)(1) (McKinney 2013).

¹⁰⁰ *Wells Fargo Bank Minn., Nat'l Ass'n v. Mastropaolo*, 42 A.D.3d 239, 240, 242, 837 N.Y.S.2d 247, 248, 250 (App. Div. 2d Dep't 2007).

¹⁰¹ See *HSBC Bank, USA v. Dammond*, 59 A.D.3d 679, 680, 875 N.Y.S.2d 490, 491 (App. Div. 2d Dep't 2009).

¹⁰² *Id.*

¹⁰³ *Id.* See, e.g., *Countrywide Home Loans Servicing, LP v. Albert*, 78 A.D.3d 983, 985, 912 N.Y.S.2d 96, 98 (App. Div. 2d Dep't 2010); *Deutsche Bank Nat'l Trust Co. v. Young*, 66 A.D.3d 819, 819, 886 N.Y.S.2d 619, 619 (App. Div. 2d Dep't 2009); *Deutsche Bank Nat'l Trust Co. v. Pietranico*, 33 Misc. 3d 528, 534, 535, 928 N.Y.S.2d 818, 823 (Sup. Ct. Suffolk County 2011).

unsatisfying. The result, whether applied in the context of mortgage foreclosure actions or other actions, does not appear particularly fair or palatable to defendants, though it may arguably be logical under the strictest reading of *Mastrapaolo*. It results in circumstances where plaintiffs retain their default judgments against defendants, even though the plaintiffs suffer from a demonstrable lack of standing and a reasonable excuse for vacating the default judgment otherwise exists under CPLR section 5015(a)(1) or CPLR section 317.¹⁰⁴ Moreover, in other instances where default judgments are vacated, the defendants then have an opportunity to serve answers and assert affirmative defenses.¹⁰⁵ This sequencing gives the impression that chronologically, a standing defense should be examined on the merits in determining motions that seek the vacatur of default judgments. It is predicted here that with time, an appellate division will address and further analyze this issue.

Opportunities to re-visit the question of whether a plaintiff's lack of standing can be raised as a "meritorious defense" for the vacatur of a default judgment may not be frequent. In *Deutsche Bank National Trust Co. v. Rudman*,¹⁰⁶ the Supreme Court, Kings County and then the Second Department, addressed a motion by the defendant to vacate his default under CPLR section 5015(a)(1).¹⁰⁷ The "meritorious defense" upon which the motion was partially based was the plaintiff's alleged lack of standing.¹⁰⁸ However, the defendant, who had served an answer to the complaint eight weeks late that was rejected as untimely, and who then did not seek to extend the time to answer until many months later, was unable to establish the prong of CPLR section 5015(a)(1) that pertains to the "reasonable excuse" for the default.¹⁰⁹ Accordingly, the Second Department affirmed the order of the supreme court that denied the motion to vacate the default judgment that had been entered, on the ground that a reasonable excuse for the default had not been

¹⁰⁴ See, e.g., *Albert*, 78 A.D.3d at 985, 912 N.Y.S.2d at 98; *Young*, 66 A.D.3d at 819, 886 N.Y.S.2d at 619; *Pietrancio*, 33 Misc. 3d at 534, 535, 928 N.Y.S.2d at 823.

¹⁰⁵ See, e.g., *Stephan B. Gleich & Assocs. v. Gritsipis*, 87 A.D.3d 216, 226, 927 N.Y.S.2d 349, 357 (App. Div. 2d Dep't 2011).

¹⁰⁶ *Deutsche Bank Nat'l Trust Co. v. Rudman*, 80 A.D.3d 651, 914 N.Y.S.2d 672 (App. Div. 2d Dep't 2011).

¹⁰⁷ *Id.* at 652, 914 N.Y.S.2d at 672.

¹⁰⁸ *Id.* The issue of standing was raised as the defendant's meritorious defense, as argued in the appellate briefs.

¹⁰⁹ *Id.*

established, and without having to reach the issue of standing.¹¹⁰

Of course, the failure to assert a waivable affirmative defense in a defendant's answer does not mean that the defendant is forever incapable of reviving the defense. CPLR section 3025 permits defendants to amend their answers once as a matter of right, within twenty days from the service of the initial pleading.¹¹¹ CPLR section 5015(a)(2), which has not yet been discussed, permits the vacatur of default judgments when there is newly-discovered evidence.¹¹² Could the discovery of new evidence of a plaintiff's lack of standing permit a defendant to obtain the dismissal of an action on that ground, after an initial answer has been served? The answer to that may be uncertain, at least in the Second Department given the language of *HSBC Bank, USA v. Dammond*.¹¹³ A defendant that does not know at the time of its answer that a lack of standing affirmative defense exists, and discovers the defense at a later time in the litigation, may—and should—move for leave to amend the answer to include the affirmative defense, to the extent permitted by CPLR section 3025.¹¹⁴ Indeed, a defendant wishing to assert any affirmative defense that has been waived may move at any time for leave to amend the answer to include the defense, as permitted by CPLR section 3025(b).¹¹⁵ The amendment procedure, even by leave of court, has been specifically recognized as available for the late assertion of an affirmative defense based upon the plaintiff's alleged lack of standing.¹¹⁶

¹¹⁰ *Id.* at 652, 914 N.Y.S.2d at 672–73.

¹¹¹ N.Y. C.P.L.R. 3025(a) (McKinney 2013).

¹¹² N.Y. C.P.L.R. 5015(a)(2) (McKinney 2013).

¹¹³ *See Dammond*, 59 A.D.3d at 680, 875 N.Y.S.2d at 491; *Dusovic v. N.J. Transit Bus Operations, Inc.*, 124 A.D.2d 634, 635–36, 508 N.Y.S.2d 26, 27–28 (App. Div. 2d Dep't 1986), *appeal dismissed*, 70 N.Y.2d 747, 747, 514 N.E.2d 391, 519 N.Y.S.2d 1033 (1987).

¹¹⁴ *See* C.P.L.R. 3025(a).

¹¹⁵ *See* C.P.L.R. 3025(b).

¹¹⁶ *See* *U.S. Bank Nat'l Ass'n v. Sharif*, 89 A.D.3d 723, 724, 933 N.Y.S.2d 293, 295 (App. Div. 2d Dep't 2011); *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1046–47, 901 N.Y.S.2d 76, 80 (App. Div. 2d Dep't 2010); *Aurora Loan Servs., LLC v. Thomas*, 70 A.D.3d 986, 987, 897 N.Y.S.2d 140, 141 (App. Div. 2d Dep't 2010); *Rudin v. Hosp. for Joint Diseases*, 34 A.D.3d 376, 376, 826 N.Y.S.2d 21, 21 (App. Div. 1st Dep't 2006); *Bradshaw v. Nat'l Structures, Inc.*, 2 A.D.3d 1282, 1282, 768 N.Y.S.2d 903, 903 (App. Div. 4th Dep't 2003), *appeal denied*, 2 N.Y.3d 702, 810 N.E.2d 913, 778 N.Y.S.2d 460 (2004); *Van Schaick v. Trs. of Union Coll.*, 285 A.D.2d 859, 860, 728 N.Y.S.2d 275, 277 (App. Div. 3d Dep't), *appeal denied*, 97 N.Y.2d 607, 764 N.E.2d 395, 738 N.Y.S.2d 291 (2001). Such motions will be denied in the event of prejudice to opposing parties, or where the proposed amendment to the pleading lacks merit. *See* *SRN Corp. v. Glass*, 244 A.D.2d 545, 546, 664 N.Y.S.2d 357, 358 (App. Div. 2d Dep't 1997).

II. THE HOME EQUITY THEFT PREVENTION ACT AND RPL SECTION 265-A

The Home Equity Theft Prevention Act was enacted by the New York State Legislature in 2006,¹¹⁷ effective February 1, 2007.¹¹⁸ In essence, HETPA was enacted to protect homeowners in default on their mortgages from fraud, deception, or unfair dealing of unscrupulous third parties purchasing the home equity of the homeowners.¹¹⁹ HETPA has components found in the New York State Banking Law, the Real Property Actions and Proceedings Law, and the Real Property Law.¹²⁰

Section 265-a of New York's Real Property Law specifically targets mortgage rescue schemes.¹²¹ In *Lucia v. Goldman*,¹²² the Second Department addressed a trial court's decision and order on a dismissal motion in an action wherein the plaintiff alleged that she was induced to convey her property in foreclosure to the defendant, upon the defendant's promise that he would pay off the mortgage and apply the remainder of the purchase price to acquire the plaintiff another home.¹²³ *Lucia* is an example of the type of dealings for which section 265-a is designed to provide protection.¹²⁴ In that case, an action was commenced by the homeowner against the lender for relief pursuant to, *inter alia*, section 265-a, and the appellate court held, under the particular circumstances of the case, that the plaintiff's complaint adequately stated a cause of action on which the relief sought could be granted.¹²⁵

Contracts covered by section 265-a of New York's Real Property Law must contain a notice that the instrument of conveyance shall

¹¹⁷ See Home Equity Prevention Act, ch. 308, 2006 N.Y. Laws 3119.

¹¹⁸ *Id.* § 3, 2006 N.Y. Laws at 3127.

¹¹⁹ Sponsor's Memorandum in Support of S. 4744-A, 229th Leg., Reg. Sess. (N.Y. 2006). See also *E. Sav. Bank v. Aguirre*, No. 26258/09, 2011 WL 723595, at *7 (Sup. Ct. Queens County Feb. 4, 2011); *Phillips-Thomas v. Ellison*, No. 17528/04, 2010 WL 1655450, at *2 (Sup. Ct. Nassau County Mar. 31, 2010); *Deutsche Bank Nat'l Trust Co. v. McRae*, 27 Misc. 3d 247, 249, 894 N.Y.S.2d 720, 721-22 (Sup. Ct. Allegany County 2010); *Wash. Mut. Bank v. Sholomov*, 20 Misc. 3d 773, 777-78, 862 N.Y.S.2d 890, 893 (Sup. Ct. Nassau County 2008); *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 598, 843 N.Y.S.2d 495, 498 (Sup. Ct. Suffolk County 2007). Although section 265-a of New York's Real Property Law was amended in 2011—effective October 3 of that year—the amendments made to the statute were only to its definitional sections. See 2011 N.Y. Laws 549-50.

¹²⁰ See *infra* Part II.

¹²¹ N.Y. REAL PROP. LAW § 265-a(1)(a)-(d) (McKinney 2013).

¹²² *Lucia v. Goldman*, 68 A.D.3d 1064, 893 N.Y.S.2d 90 (App. Div. 2d Dept 2009).

¹²³ *Id.* at 1064-65, 893 N.Y.S.2d at 91.

¹²⁴ *Id.* at 1064-65, 1066, 893 N.Y.S.2d at 91-92, 93.

¹²⁵ *Id.* at 1065, 893 N.Y.S.2d at 91-92.

not become effective before midnight of the fifth business day after the date on which the contract is executed.¹²⁶ During that five business day period, the equity seller may cancel the contract by executing a prescribed form, or by other means, evidencing the seller's intention not to be bound by the contract.¹²⁷ During the cancellation period, the equity purchaser is not permitted to accept or record the instrument of conveyance, transfer or encumber the property, or pay consideration to the equity seller.¹²⁸ Additionally, during the five business day period, the equity purchaser is not permitted to convince the equity seller to waive the cancellation rights, or falsely represent to the seller the property's value or equity, the purchaser's status, or the foreclosure process.¹²⁹ If a contract for conveyance is cancelled, the equity purchaser must within ten days of the cancellation return to the equity seller the original contract, any consideration or fees that had been paid, and to release the seller from all obligations.¹³⁰

The bite of section 265-a is primarily criminal rather than civil. An equity purchaser's violation of specified sections of section 265-a is designated as a class A misdemeanor.¹³¹ A violation of the same provisions with intent to defraud is designated as a class E felony.¹³² Penalties include prison sentences as authorized by the state's penal law for class A misdemeanors and class E felonies, and fines in both instances of up to \$25,000.¹³³

¹²⁶ See REAL PROP. LAW § 265-a(3), (5)(a).

You may cancel this contract at any time before midnight of (date). (Name of equity purchaser) or anyone working for (name of equity purchaser) CANNOT ask you to sign or have you sign any deed or any other document until your right to cancel this contract has ended. See attached notice of cancellation form for an explanation of this right. You should always consult an attorney or community organization before signing any legal documents concerning your home. It is advisable that you find your own attorney, and not consult with an attorney that has been provided to you by the purchaser. The law requires that this contract contain the entire agreement. You should not rely upon any other written or oral agreement or promise.

Id. § 265-a(4)(i) (providing the template above for the creation of the requisite notice).

¹²⁷ See *id.* § 265-a(4)(h), (4)(i), 5(b).

¹²⁸ *Id.* § 265-a(7)(a).

¹²⁹ See *id.* § 265-a(7)(b).

¹³⁰ *Id.* § 265-a(5)(d).

¹³¹ See *id.* § 265-a(10)(a)(ii).

¹³² See *id.* § 265-a(10)(a)(i).

¹³³ See *id.* § 265-a(10)(a)(i)-(ii).

III. HEPTA'S 90-DAY MORTGAGE FORECLOSURE NOTICE UNDER SECTION 1304 HEPTA'S 90-DAY MORTGAGE FORECLOSURE NOTICE UNDER SECTION 1304 OF NEW YORK'S REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

A further HETPA protection bestowed upon New York State homeowners by the state's legislature is found in section 1304 of New York's Real Property Actions and Proceedings.¹³⁴ The statute was enacted in 2008, initially effective as of September 1, 2008, and was later amended effective January 14, 2010, and October 3, 2011.¹³⁵

Section 1304 requires that lenders, assignees, and mortgage loan servicers provide homeowners with at least ninety days of notice prior to the commencement of any foreclosure litigation.¹³⁶ The notice warns the homeowner, in essence, that their mortgage is in default, placing the homeowner at risk of losing the home, and specifying the amount of arrears that needed to be paid in order to cure the default.¹³⁷ The notice must also inform the homeowner of government approved housing counseling agencies that provide free or low-cost housing advice.¹³⁸ The notice must also encourage the homeowner to contact one of the counseling agencies.¹³⁹ Finally, the notice advises that if the default issues are not resolved within ninety days, a foreclosure action may be commenced against the homeowner.¹⁴⁰ The number of government approved housing

¹³⁴ N.Y. REAL PROP. ACTS. LAW § 1304 (McKinney 2013).

¹³⁵ *Id.*

¹³⁶ *Id.* § 1304(1); Wells Fargo Bank, N.A. v. Barrett, No. 13034/11, 2011 WL 4838765, at *3 (Sup. Ct. Queens County Oct. 6, 2011); Bank of Am. v. Guzman, 26 Misc. 3d 922, 923, 892 N.Y.S.2d 846, 847 (Sup. Ct. Queens County 2009).

¹³⁷ REAL PROP. ACTS. LAW § 1304(1); see *Guzman*, 26 Misc. 3d at 923, 892 N.Y.S.2d at 847.

¹³⁸ REAL PROP. ACTS. LAW § 1304(1); GMAC Mortg. LLC v. Munoz, No. 2103-2010, 2010 WL 3583992, at *1, *2 (Sup. Ct. Suffolk County Sept. 9, 2010).

¹³⁹ See *Munoz*, 2010 WL 3583992 at *2.

¹⁴⁰ REAL PROP. ACTS. LAW § 1304(1). The template notice set forth in the statute reads as follows:

YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY

As of . . . , your home loan is . . . days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of dollars by

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or . . . low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment

counselors identified in the notice shall be at least five, along with their last known addresses and telephone numbers.¹⁴¹ The statutory provisions are not retroactive, and apply only to actions commenced on or after its effective date.¹⁴²

To assure the homeowner's receipt of the notice, the statute requires that it be transmitted by certified or registered mail, and also by first class mail to the last known address of the borrower, and if different, the address that is the subject of the mortgage.¹⁴³ The requirement that registered or certified mail be used for at least one of the mailings makes sense for all parties—it helps assure that the transmitted notice is actually received by the homeowner, and it provides the lender with documentary evidence that the delivery requirements of the statute were met.¹⁴⁴ The ninety-day notice period begins upon the posting of the notice.¹⁴⁵

RPAPL section 1304 specifies the visual form that notices under the statute must take. Fourteen-point typeface is specifically

plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in a dwelling as your primary residence.)

If you need further information, please call the New York State Banking Department's toll-free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

Id.

¹⁴¹ *Id.*; *id.* § 1304(2).

¹⁴² See *Keystone Nazareth Bank & Trust Co. v. Rosenbaum*, No. 32097/09, 2011 WL 2712955, at *2 (Sup. Ct. Kings County July 8, 2011); *Countrywide Home Loans, Inc. v. Heirs of Estate of Caldwell*, No. 0001595/2008, 2010 WL 3153788, at *2 (Sup. Ct. Queens County Aug. 4, 2010).

¹⁴³ REAL PROP. ACTS. LAW § 1304(2); *Deutsche Bank Trust Co. v. Day*, No. 2728-11, 2011 WL 7014817, at *3, *5 (Sup. Ct. Suffolk County Dec. 15, 2011) (denying summary judgment for plaintiff's failure to demonstrate full compliance with service provisions of RPAPL section 1304); *Wells Fargo Bank, N.A. v. Barrett*, No. 13034/11, 2011 WL 4838765, at *3 (Sup. Ct. Queens County Oct. 6, 2011) (same); *Bank of Am., Nat'l Ass'n v. Maharaj*, No. 5804-2010, 2010 WL 3769224, at *2 (Sup. Ct. Suffolk County Sept. 21, 2010); *Munoz*, 2010 WL 3583992, at *2; *Bank of Am. v. Guzman*, 26 Misc. 3d 922, 923, 892 N.Y.S.2d 846, 847 (Sup. Ct. Queens County 2009); see *Wells Fargo Bank, NA v. Ghobrial*, No. 100867/08, 2011 WL 4838917, at *3 (Sup. Ct. Queens County Oct. 11, 2011) (dismissing complaint as requirement to serve the section 1304 notice by registered or certified mail, which was not evidenced, suggested non-compliance with the statute).

¹⁴⁴ See *Guzman*, 26 Misc. 3d at 923, 892 N.Y.S.2d at 847 (finding that the plaintiff's failure to provide documentary evidence that the notice requirements of RPAPL section 1304 were satisfied warranted dismissal of the complaint).

¹⁴⁵ REAL PROP. ACTS. LAW § 1304(1).

required.¹⁴⁶ A close reading of the statute reveals, however, that unlike another HEPTA statute discussed *infra*, the notice need not be printed in bold type and colored paper need not be used.¹⁴⁷

While the original form of RPAPL section 1304 only applied to residential foreclosure actions involving subprime, high cost, and non-traditional home loans, the amendment effective January 14, 2010 expanded the statute to all home loans.¹⁴⁸

Strict compliance with the requirements of RPAPL section 1304 is required, in terms of both the substance of the notice and the timing of its transmittal. In an opinion by Justice Daniel Angiolillo of the Second Department in *Aurora Loan Services, LLC v. Weisblum*,¹⁴⁹ strict compliance with the statute's requirements was held to be a mandatory condition precedent to suit, and a plaintiff's failure to comply with the statutory terms required dismissal of the action.¹⁵⁰ *Weisblum* involved a motion and cross-motion by the plaintiff lender and the defendant homeowners, respectively, in an action to foreclose upon a defaulted consolidated note.¹⁵¹ The two defendants, who were husband and wife and both named as borrowers on the mortgage agreement, argued that the plaintiff failed to comply, *inter alia*, with RPAPL section 1304, as an RPAPL section 1304 notice was delivered to the husband only and never to the wife.¹⁵² The plaintiff argued that it had fully complied with RPAPL 1304, as only the husband was named as a borrower on the related consolidated note.¹⁵³ The Second Department noted that the term

¹⁴⁶ *Id.* (requiring a minimum of fourteen-point font for the notice statement to the buyer of default).

¹⁴⁷ *See generally id.* (stating nothing in the statute that would suggest that the notice requirement must be in bold print or on colored paper).

¹⁴⁸ *See* Act of Dec. 15, 2009, ch. 507, § 1-a, 2009 N.Y. Laws 1384, 1386 (codified as amended in REAL PROP. ACTS. LAW § 1304).

¹⁴⁹ *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 923 N.Y.S.2d 609 (App. Div. 2d Dep't 2011).

¹⁵⁰ *Id.* at 103, 923 N.Y.S.2d at 614. *See also* Wells Fargo Bank, N.A. v. Barrett, No. 13034/11, 2011 WL 4838765, at *3 (Sup. Ct. Richmond County Oct. 6, 2011) (holding that plaintiff's failure to show strict compliance with RPAPL section 1304 required dismissal); *Bank of Am. v. Guzman*, 26 Misc. 3d 922, 924, 892 N.Y.S.2d 846, 847 (Sup. Ct. Queens County 2009) (holding that ninety-day notice is a requirement of the statute and plaintiff's failure to comply with that condition requires dismissal of the action) (citing *Troy v. Town of Hyde Park*, 63 A.D.3d 913, 915, 882 N.Y.S.2d 159, 161 (App. Div. 2d Dep't 2009)); *Butler Capital Corp. v. Cannistra*, 26 Misc. 3d 598, 607, 891 N.Y.S.2d 238, 245 (Sup. Ct. Suffolk County 2009) (finding that a court must ascertain whether the plaintiff has satisfied the requirements of RPAPL section 1304 otherwise relief cannot be granted).

¹⁵¹ *Weisblum*, 85 A.D.3d at 100–01, 923 N.Y.S.2d at 612–13.

¹⁵² *Id.* at 101, 923 N.Y.S.2d at 613.

¹⁵³ *Id.* at 105, 923 N.Y.S.2d at 616.

“borrower” had no definition within the language of the statute.¹⁵⁴ The Second Department also noted that the content, timing, and service provisions of RPAPL section 1304 were “very specific and couched in mandatory language.”¹⁵⁵ The appellate court determined that the wife was, in fact, a “borrower,” as she would be as affected by a foreclosure upon the premises as her husband,¹⁵⁶ and concluded that since the plaintiff failed to send to her the required RPAPL section 1304 notice, there was a failure of a condition precedent that required the dismissal of the action.¹⁵⁷ Cooperative apartments are personal property, rather than real property, and therefore fall outside the scope of RPAPL section 1304.¹⁵⁸ Recognizing the cooperative apartment owners were not eligible for the same protections as owners of real properties, the state legislature enacted UCC section 9-611(f), which offers them similar protections as those now enjoyed by residential homeowners.¹⁵⁹

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 103–04, 923 N.Y.S.2d at 614.

¹⁵⁶ *Id.* at 105, 923 N.Y.S.2d at 616.

¹⁵⁷ *Id.* at 106, 108, 923 N.Y.S.2d at 616, 617. *See also* *Emigrant Mortg. Co. v. Fitzpatrick*, 29 Misc. 3d 746, 751, 906 N.Y.S.2d 874, 879 (Sup. Ct. Suffolk County 2010) (holding that the plaintiff failed to demonstrate proof he had met the requirements of RPAPL section 1304 and thus his motion for summary judgment was denied), *order rev'd by* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (App. Div. 2d Dep't 2012); *Indymac Fed. Bank FSB v. Black*, No. 226806, 2009 WL 211787, at *1 (Sup. Ct. Rensselaer County Jan. 23, 2009) (holding that the plaintiff did not satisfy the ninety-day notice requirement set forth in RPAPL section 1304 and as a result the case must be dismissed); *Guzman*, 26 Misc. 3d at 924, 892 N.Y.S.2d at 847 (same).

¹⁵⁸ *See* N.Y. REAL PROP. ACTS. LAW § 1303 (McKinney 2013) (applying notice provisions to “mortgage foreclosure action[s] involving real property”).

¹⁵⁹ *See* N.Y. U.C.C. LAW § 9-611(f) (McKinney 2013); *Goldman v. Emigrant Sav. Bank Long Island*, No. 10554/11, 2011 WL 3821477, at *3 (Sup. Ct. Queens County Aug. 19, 2011). Although the statute was originally enacted in 2001, it was amended in 2009, effective as of January 14, 2010, and amended again in 2011, effective October 3, 2011. *See* Financial Services Law, ch. 62, § 104, 2011 N.Y. Laws 547, 587 (codified as amended at N.Y. U.C.C. LAW § 9-611(f)); *see also* Act of Dec. 15, 2009, ch. 507, § 1-a, 2009 N.Y. Laws 1384, 1386 (codified as amended in REAL PROP. ACTS. LAW § 1304 (McKinney 2013)). It was these amendments that gave the present statutes their fullest effect. The notice that must be provided to cooperative apartment owners, as contained in UCC section 9-611(f)(3) reads as follows:

Help for Homeowners at Risk of Foreclosure

New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

Notice

You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

Sources of Information and Assistance

The state encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures.

To locate a housing counselor near you, you may call the toll-free helpline maintained

IV. HEPTA'S HOUSING COUNSELOR NOTICE REQUIREMENT UNDER RPAPL SECTION 1303

The RPAPL portion of HETPA, set forth in section 1303, requires foreclosing parties to provide statutory-specific notice to residential homeowners and tenants, together with the summons and complaint by which foreclosure is sought.¹⁶⁰ RPAPL section 1303 was enacted in 2006, originally effective as of February 1, 2007,¹⁶¹ and underwent some tweaking by amendments enacted in 2007,¹⁶² 2008,¹⁶³ 2009,¹⁶⁴ 2010,¹⁶⁵ and 2011.¹⁶⁶ Naturally, the statute and its amendments apply to all foreclosure actions commenced on or after their effective dates of the enactments.¹⁶⁷

RPAPL section 1303 triggers at one of the earliest stages of foreclosure actions, when the summons and complaint are served upon the defendant(s) in the action.¹⁶⁸ The statute requires that the

by the New York State Banking Department at (enter number) or visit the Department's website at (enter web address).

One of these persons or organizations may be able to help you, including trying to work with your lender to modify the loan to make it more affordable.

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions or collateral sales in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign any papers that transfer rights of any kind to your cooperative apartment. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.

U.C.C. LAW § 9-611(f)(3) (first emphasis in original).

¹⁶⁰ REAL PROP. ACTS. LAW § 1303.

¹⁶¹ See Home Equity Theft Prevention Act, ch. 308, § 4, 2006 N.Y. Laws 3119, 3127 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶² See Act of July 3, 2007, ch. 154, § 13, 2007 N.Y. Laws 2836, 2839 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶³ See Act of Aug. 5, 2008, ch. 472, § 1, 2008 N.Y. Laws, 3604, 3604-05 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶⁴ See Act of Dec. 15, 2009, ch. 507, § 1, 2009 N.Y. Laws 1384, 1384-85 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶⁵ See Act of Aug. 13, 2010, ch. 358, § 1, 2010 N.Y. Laws 1132, 1132-33 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶⁶ See Act of Mar. 31, 2011, ch. 62, § 104, 2011 N.Y. Laws 547, 587 (codified as amended at REAL PROP. ACTS. LAW § 1303).

¹⁶⁷ See *Flushing Sav. Bank, FSB v. 509 Rogers LLC*, 32 Misc. 3d 420, 423-24, 928 N.Y.S.2d 618, 621 (Sup. Ct. Kings County 2011).

¹⁶⁸ See REAL PROP. ACTS. LAW § 1303(2); *First Nat'l Bank of Chi. v. Silver*, 73 A.D.3d 162, 165, 899 N.Y.S.2d 256, 259 (App. Div. 2d Dep't 2010); *Butler Capital Corp. v. Cannistra*, 26 Misc. 3d 598, 605-06, 891 N.Y.S.2d 238, 244 (Sup. Ct. Suffolk County 2009); *WMC Mortg. Corp. v. Thompson*, 24 Misc. 3d 738, 739, 877 N.Y.S.2d 885, 886 (Sup. Ct. Kings County 2009); *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 598-99, 843 N.Y.S.2d 495,

notice accompanying the summons and complaint advise the defendant against mortgage foreclosure rescue scams,¹⁶⁹ by which it dovetails the purpose of RPL section 265-a.¹⁷⁰ The notice also must advise the defendant homeowner, *inter alia*, that he or she is in danger of losing the home; that the failure to respond to the summons and complaint may result in the loss of the home; that an attorney or local legal aid office should be contacted for advice; and that in addition to consulting an attorney or legal aid office, the defendant homeowner may contact specified government agencies and non-profit organizations for information about options, for which phone numbers are given.¹⁷¹ The statute affords additional protections to tenants of properties subject to foreclosure that are, for the most part, outside the scope of this article.¹⁷²

498–99 (Sup. Ct. Suffolk County 2007).

¹⁶⁹ See REAL PROP. ACTS. LAW § 1303(3).

¹⁷⁰ See N.Y. REAL PROP. LAW § 265-a(1)(d) (McKinney 2013).

¹⁷¹ REAL PROP. ACTS. LAW § 1303(3).

¹⁷² The statute also bestows protections upon tenants occupying dwelling units of the residential homes subject to foreclosure. RPAPL section 1303(5) requires that a written notice be transmitted to tenants of dwelling units. REAL PROP. ACTS. LAW § 1303(5). The template notice, as provided by RPAPL 1303(5), reads as follows:

Notice to Tenants of Buildings in Foreclosure

New York State Law requires that we provide you this notice about the foreclosure process. Please read it carefully.

We, (name of foreclosing party), are the foreclosing party and are located at (foreclosing party's address). We can be reached at (foreclosing party's telephone number).

The dwelling where your apartment is located is the subject of a foreclosure proceeding. If you have a lease, are not the owner of the residence, and the lease requires payment of rent that at the time it was entered into was not substantially less than the fair market rent for the property, you may be entitled to remain in occupancy for the remainder of your lease term. If you do not have a lease, you will be entitled to remain in your home until ninety days after any person or entity who acquires title to the property provides you with a notice as required by section 1305 of the Real Property Actions and Proceedings Law. The notice shall provide information regarding the name and address of the new owner and your rights to remain in your home. These rights are in addition to any others you may have if you are a subsidized tenant under federal, state, or local law or if you are a tenant subject to rent control, rent stabilization or a federal statutory scheme.

ALL RENT-STABILIZED TENANTS AND RENT-CONTROLLED TENANTS ARE PROTECTED UNDER THE RENT REGULATIONS WITH RESPECT TO EVICTION AND LEASE RENEWALS. THESE RIGHTS ARE UNAFFECTED BY A BUILDING ENTERING FORECLOSURE STATUS. THE TENANTS IN RENT-STABILIZED AND RENT-CONTROLLED BUILDINGS CONTINUE TO BE AFFORDED THE SAME LEVEL OF PROTECTION EVEN THOUGH THE BUILDING IS THE SUBJECT OF FORECLOSURE. EVICTIONS CAN ONLY OCCUR IN NEW YORK STATE PURSUANT TO A COURT ORDER AND AFTER A FULL HEARING IN COURT.

If you need further information, please call the New York State Banking Department's tollfree helpline at 1-877BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

Id.

To help assure that the RPAPL section 1303 notice is seen and read by the defendant homeowner, the statute requires that the notice be printed in fourteen-point bold typeface, on colored paper of a different color than the summons and complaint.¹⁷³ In this regard, there are similarities between RPAPL sections 1303 and 1304.¹⁷⁴ The protections of the statute only apply to mortgage foreclosure proceedings involving owner-occupied one to four family dwellings.¹⁷⁵

Decisional authority has developed that to prove delivery of the RPAPL section 1303 notice upon defendant homeowners, it is not sufficient to merely attach a copy of the notice, with its fourteen-point sized print and colored paper, to the copy of the summons and complaint filed with the court.¹⁷⁶ The reason, apparently, is that the attachment of the notice to the filed copy of the summons and complaint does not evidence its delivery to the defendant homeowner.¹⁷⁷ The required notice is not *part* of the complaint, but merely *accompanies* the complaint.¹⁷⁸ RPAPL section 1303 does not require “service” of the notice in the sense of CPLR section 308, but rather, uses the looser standard of “delivery.”¹⁷⁹ As a practical matter, the delivery of the RPAPL section 1303 notice will typically be accomplished at the same time and in the same manner as the service of the plaintiffs’ summonses and complaints.¹⁸⁰ Nevertheless, the “delivery” of the notice must be established in order for the plaintiff to satisfy the requirements of the statute, either by attorney affirmation¹⁸¹ or, alternatively, by an affidavit of

¹⁷³ See REAL PROP. ACTS. LAW § 1303(2); *Silver*, 73 A.D.3d at 166, 899 N.Y.S.2d at 259; *Thompson*, 24 Misc. 3d at 739, 877 N.Y.S.2d at 886; CIT Group/Consumer Fin., Inc. v. Platt, No. 11410/08, 2011 WL 6118534, at *3 (Sup. Ct. Queens County Dec. 7, 2011); Wells Fargo Bank, N.A. v. Barrett, No. 13034/11, 2011 WL 4838765, at *2 (Sup. Ct. Queens County Oct. 6, 2011); *Cannistra*, 26 Misc. 3d at 605, 891 N.Y.S.2d at 244; Deutsche Bank Trust Co. Ams. v. Eisenberg, No. 17879-2008, 2009 WL 1789407, at *5 (Sup. Ct. Suffolk County 2009); *Taylor*, 17 Misc. 3d at 598, 843 N.Y.S.2d at 498.

¹⁷⁴ Compare REAL PROP. ACTS. LAW § 1303(2), with N.Y. REAL PROP. ACTS. LAW § 1304(1) (McKinney 2013).

¹⁷⁵ See REAL PROP. ACTS. LAW § 1303(1)(a); *Cannistra*, 26 Misc. 3d at 605, 891 N.Y.S.2d at 244; *Taylor*, 17 Misc. 3d at 598, 843 N.Y.S.2d at 498.

¹⁷⁶ *Cannistra*, 26 Misc. 3d at 606, 891 N.Y.S.2d at 244; *Taylor*, 17 Misc. 3d at 599, 843 N.Y.S.2d at 499.

¹⁷⁷ See *Cannistra*, 26 Misc. 3d at 606, 891 N.Y.S.2d at 244; *Taylor*, 17 Misc. 3d at 599, 843 N.Y.S.2d at 499.

¹⁷⁸ See *Thompson*, 24 Misc. 3d at 739, 877 N.Y.S.2d at 886.

¹⁷⁹ See REAL PROP. ACTS. LAW § 1303(2) (requiring that notice “shall be delivered with the summons and complaint”); CIT Group/Consumer Fin., Inc. v. Platt, No. 11410/08, 2011 WL 6118534, at *3 (Sup. Ct. Queens County Dec. 7, 2011).

¹⁸⁰ See REAL PROP. ACTS. LAW § 1303(2).

¹⁸¹ See *Cannistra*, 26 Misc. 3d at 605, 891 N.Y.S.2d at 244; Deutsche Bank Trust Co. Ams.

service from the person that served process upon the homeowner defendant.¹⁸² The absence of sufficient proof of delivery proved fatal to the plaintiffs motions for a default judgment in, *inter alia*, *Butler Capital Corp. v. Cannistra*,¹⁸³ *Countrywide Home Loans, Inc. v. Taylor*,¹⁸⁴ or, alternatively, by an affidavit of service from the person that served process upon the homeowner defendant.¹⁸⁵ The absence of sufficient proof of delivery proved fatal to the plaintiffs motions for a default judgments in, *inter alia*, *Butler Capital Corp. v. Cannistra*, *Countrywide Home Loans, Inc. v. Taylor*, and to a plaintiff's motion to amend a complaint in *WMC Mortgage Corp. v. Thompson*.¹⁸⁶

A Second Department decision that is of importance to RPAPL section 1303 is *First National Bank of Chicago v. Silver*, an opinion by Justice Anita Florio released by the court on March 23, 2010.¹⁸⁷ The appeal addressed the question of whether compliance with RPAPL section 1303 is a condition precedent that plaintiffs must affirmatively prove in order to prevail in a foreclosure action, or whether non-compliance is an affirmative defense that must be raised and litigated by the defendant.¹⁸⁸ The appeal addressed "an issue of first impression."¹⁸⁹ The Second Department concluded that compliance with RPAPL section 1303 was a condition precedent that must be affirmatively proven by foreclosure plaintiffs, akin to condition precedents that are found in actions or proceedings involving RPAPL 735(1), RPL section 232-a, Vehicle and Traffic Law ("VTL") section 313, and General Municipal Law ("GML") section 50-e.¹⁹⁰ The court noted that the language of RPAPL section

v. Eisenberg, No. 17879-2008, 2009 WL 1789407, at *6 (Sup. Ct. Suffolk County 2009).

¹⁸² See *Platt*, 2011 WL 6118534, at *3; *Wells Fargo Bank v. Ghobrial*, No. 100867/08, 2011 WL 4838917, at *3 (Sup. Ct. Richmond County Oct. 11, 2011); *HSBC Bank USA v. Abass*, No. 11254/2008, 2011 WL 2586375, at *3 (Sup. Ct. Queens County June 29, 2011).

¹⁸³ See *Cannistra*, 26 Misc. 3d at 605-06, 891 N.Y.S.2d at 244.

¹⁸⁴ *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 596, 598, 843 N.Y.S.2d 495, 496, 498 (Sup. Ct. Suffolk County 2007). The default motion was denied in this instance without prejudice to a further application satisfying the requirements of, *inter alia*, section 1303 of New York's Real Property Actions and Proceedings Law. *Id.* at 596, 843 N.Y.S.2d at 496.

¹⁸⁵ See *Platt*, 2011 WL 6118534 at *3; *Ghobrial*, 2011 WL 4838917 at *3. *But see Abass*, 2011 WL 2586375 at *3.

¹⁸⁶ See *WMC Morg. Corp. v. Taylor*, 24 Misc. 3d 738, 739, 877 N.Y.S.2d 885, 886 (Sup. Ct. Kings County 2009).

¹⁸⁷ *First Nat'l Bank of Chi. v. Silver*, 73 A.D.3d 162, 162, 163, 899 N.Y.S.2d 256, 256, 257 (App. Div. 2d Dep't 2010).

¹⁸⁸ See *id.* at 163, 899 N.Y.S.2d at 257.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 167-69, 899 N.Y.S.2d at 260-61; *Platt*, 2011 WL 6118534, at *3; *Wells Fargo Bank, N.A. v. Barrett*, No. 13034/11, 2011 WL 4838765, at *2 (Sup. Ct. Queens County Oct. 6,

1303 expressly provides that the required notice “shall” be delivered to the defendant, the same word as appears in the other statutes that involve conditions precedent.¹⁹¹ Proof of compliance can be established by means of attorney affirmations and process server affidavits.¹⁹²

While the plaintiff is required by *First National Bank of Chicago v. Silver* to prove compliance with the mandates of RPAPL section 1303, another statute, CPLR section 3015(a), provides that conditions precedent need not be affirmatively pleaded by plaintiffs.¹⁹³ Nevertheless, *Silver* can be reconciled with the language of CPLR section 3015(a). Plaintiffs cannot be expected or required to affirmatively plead compliance with RPAPL section

2011); Thornburg Mortg. Home Loans, Inc. v. Beltrami, No. 106026, 2011 WL 3236284, at *3 (Sup. Ct. New York County July 11, 2011); Stern-Obstfeld v. Bank of Am., 30 Misc. 3d 901, 906, 915 N.Y.S.2d 456, 460 (Sup. Ct. New York County 2011); Butler Capital Corp. v. Cannistra, 26 Misc. 3d 598, 605–06, 891 N.Y.S.2d 238, 244 (Sup. Ct. Suffolk County 2009); David D. Siegel, *Foreclosure Action is Dismissed Because Plaintiff Didn't Comply with Recently Added HETPA Notice*, 226 SIEGEL'S PRAC. REV. 2 (Oct. 2010); David D. Siegel, *Foreclosing Mortgagee's Failure to Comply with Notice Provision in "Equity Theft Prevention" Act Can be Raised by Mortgagor at Any Time*, 220 SIEGEL'S PRAC. REV. 2 (Apr. 2010). There appears to be only one reported trial level case that has not interpreted compliance with RPAPL section 1303 as a condition precedent. See *Trustco Bank v. Alexander*, No. 2008-3351, 2009 WL 1425247, at *4 (Sup. Ct. Saratoga County May 12, 2009). In *Trustco Bank*, a residential foreclosure action was commenced by filing and service mere days before the initial effective date of the statute, and the court excused the plaintiff's non-compliance using its discretionary authority found in CPLR section 2001. *Id.* The reasoning of *Trustco Bank v. Alexander* is questionable now, in light of the stricter interpretation found in the later-decided appellate case of *First National Bank of Chicago v. Silver*. *Silver*, 73 A.D.3d at 169, 899 N.Y.S.2d at 261.

¹⁹¹ *Silver*, 73 A.D.3d at 169, 899 N.Y.S.2d at 261.

¹⁹² *Deutsche Bank Trust Co. v. Day*, No. 2728-11, 2011 WL 7014817, at *3 (Sup. Ct. Suffolk County Dec. 15, 2011) (indicating that process servers must adequately describe the notice delivered to the homeowner for their affidavits to be sufficient).

¹⁹³ N.Y. C.P.L.R. 3015(a) (McKinney 2013); *Allis-Chalmers Mfg. Co. v. Malan Constr. Corp.*, 30 N.Y.2d 225, 231, 282 N.E.2d 600, 602, 331 N.Y.S.2d 636, 639 (1972); *Giant Group, Ltd. v. Arthur Andersen LLP*, 2 A.D.3d 189, 190, 770 N.Y.S.2d 291, 292 (App. Div. 1st Dep't 2003); *Pollack v. Nemet Motors, Inc.*, 167 A.D.2d 153, 153, 561 N.Y.S.2d 457, 458 (App. Div. 1st Dep't 1990); *Gonsenhaus v. Cent. Trust Co.*, 51 A.D.2d 664, 664, 378 N.Y.S.2d 536, 538–39 (App. Div. 4th Dep't 1976); *G.A.C. Commercial Corp. v. La Pardo Bros. Excavating Contractors, Inc.*, 33 A.D.2d 777, 777, 307 N.Y.S.2d 186, 187 (App. Div. 2d Dep't 1969); 288/98 *W. End Tenants Corp. v. Mosesson*, 128 Misc. 2d 176, 177, 488 N.Y.S.2d 945, 946 (Sup. Ct. New York County 1984). The failure of a plaintiff to comply with a condition precedent must be affirmatively pleaded by the defendant. *Igara Realty Corp. v. N.Y. Prop. Ins. Underwriting Ass'n*, 63 N.Y.2d 201, 218, 470 N.E.2d 858, 864–65, 481 N.Y.S.2d 60, 66 (1984); 1199 *Hous. Corp. v. Int'l Fid. Ins. Co.*, 14 A.D.3d 383, 384, 788 N.Y.S.2d 88, 89 (App. Div. 1st Dep't 2005); *City of N.Y. v. Delafield 246 Corp.*, 236 A.D.2d 11, 22, 662 N.Y.S.2d 286, 293 (App. Div. 1st Dep't), *order resettled*, 244 A.D.2d 272, 668 N.Y.S.2d 89 (App. Div. 1st Dep't 1997), *leave to appeal denied*, 91 N.Y.2d 811, 694 N.E.2d 884, 671 N.Y.S.2d 715 (1998); *First N. Mortgage Corp. v. Yatrakis*, 154 A.D.2d 433, 433–34, 546 N.Y.S.2d 9, 10 (App. Div. 2d Dep't 1989); 125 *Skillman Ave. Corp. v. Am. Home Assurance Co.*, 103 Misc. 2d 284, 285, 425 N.Y.S.2d 716, 717–18 (Civ. Ct. Kings County 1980).

1303, as the RPAPL section 1303 notice must be delivered to the defendant *with* the summons and complaint, and the complaint is necessarily drafted before service of process is accomplished.¹⁹⁴ Other condition precedents, such as the filing of a GML section 50-e notice of claim with a municipality for matters involving personal injury and wrongful death, can be affirmatively pleaded in a plaintiff's complaint,¹⁹⁵ as the notice of claim necessarily precedes the drafting, filing, and service of the complaint.¹⁹⁶ The *Silver* case should be read not with an emphasis on what may or may not be pleaded in the plaintiff's complaint, but rather, on what must or must not appear in the defendant's answer. The case ultimately holds that defendants who fail to plead the plaintiff's non-compliance with RPAPL section 1303 do not waive the defense of non-compliance.¹⁹⁷ Accordingly, the defendant homeowners could oppose the plaintiff's motion for summary judgment, and cross-move for summary judgment against the plaintiff's complaint, even though the plaintiff's alleged non-compliance with RPAPL section 1303 was not pleaded as an affirmative defense in the defendants' answer.¹⁹⁸ The defense can therefore be raised by defendants at any time, and plaintiffs, while required to comply with the statute as a condition precedent to recovery, need not affirmatively plead compliance with the statute in their complaints.¹⁹⁹

The application of RPAPL section 1303 has been interpreted expansively. In *Board of Directors of House Beautiful at Woodbury Homeowners Ass'n v. Godt*,²⁰⁰ the Second Department addressed the question of whether RPAPL 1303, which plaintiff admittedly did not comply with, was applicable at all where the plaintiff was a homeowners' association seeking to foreclose upon an assessment lien.²⁰¹ The court concluded that homeowners' associations are within the scope of the statute, and dismissed the complaint on the ground that the non-inclusion of homeowners' associations would be

¹⁹⁴ N.Y. REAL. PROP. ACTS. LAW § 1303(2) (McKinney 2013) (stating that the notice is delivered with both the summons and the complaint).

¹⁹⁵ N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 2013); *Silver*, 73 A.D.3d at 169, 899 N.Y.S.2d at 261.

¹⁹⁶ See GEN. MUN. LAW § 50-e(2) (noting the content requirements for proper notice).

¹⁹⁷ *Silver*, 73 A.D.3d at 169, 899 N.Y.S.2d at 261.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ Bd. of Dirs. of House Beautiful at Woodbury Homeowners Ass'n, Inc. v. Godt, 32 Misc. 3d 366, 926 N.Y.S.2d 812 (Sup. Ct. Nassau County 2011), *aff'd as modified*, 96 A.D.3d 983, 947 N.Y.S.2d 572 (App. Div. 2d Dep't 2012).

²⁰¹ *Id.* at 368, 926 N.Y.S.2d at 814.

inconsistent with the analyzed legislative intent.²⁰²

V. THE PROVISIONS OF BANKING LAW SECTIONS 6-L AND 6-M

An additional statutory component of HETPA is found in the New York State Banking Law, and in particular, sections 6-l and 6-m thereof.²⁰³ The primary difference between the two statutes is that section 6-l applies to “high-cost home loans” while section 6-m applies to “subprime home loans.”²⁰⁴ A high-cost home loan is one that exceeds certain thresholds defined in the statute, such as loans where the rate of interest is more than 8% above the yield on treasury securities at the approximate time of execution, or where total points and fees exceed 5% if the total loan amount of the loan is for \$50,000 or more, or exceed 6% or \$1500 (whichever is greater) if the total loan amount is for less than \$50,000.²⁰⁵ A subprime

²⁰² *Id.* at 369, 926 N.Y.S.2d at 814.

²⁰³ See N.Y. BANKING LAW § 6-l (McKinney Supp. 2012); *id.* § 6-m.

²⁰⁴ Compare BANKING LAW § 6-l(2), with *id.* § 6-m(2) (listing the limitations and practices that are prohibited with regards to high-cost home loans and subprime home loans, respectively).

²⁰⁵ See BANKING LAW § 6-l(1)(d), (g) The actual threshold, defined by Banking Law section 6-l(1)(g), is defined as follows:

(i) For a first lien mortgage loan, the annual percentage rate of the home loan at consummation of the transaction 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; or for a subordinate mortgage lien, the annual percentage rate of the home loan at consummation of the transaction equals or exceeds nine percentage points over the yield on treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for extension of credit is received by the lender; as determined by the following rules: if the terms of the home loan offer any initial or introductory period, and the annual percentage rate is less than that which will apply after the end of such initial or introductory period, then the annual percentage rate that shall be taken into account for purposes of this section shall be the rate which applies after the initial or introductory period; or

(ii) The total points and fees exceed: five percent of the total loan amount if the total loan amount is fifty thousand dollars or more; or six percent of the total loan amount if the total loan amount is fifty thousand dollars or more and the loan is a purchase money loan guaranteed by the federal housing administration or the veterans administration; or the greater of six percent of the total loan amount or fifteen hundred dollars, if the total loan amount is less than fifty thousand dollars; provided, the following discount points shall be excluded from the calculation of the total points and fees payable by the borrower:

(1) Up to and including two bona fide loan discount points payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed by more than one percentage point the yield on United States 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 is received;

home loan, by contrast, is one where the initial interest rate or the fully-indexed rate (whichever is higher) is more than 1.75% for first lien loans, or more than 3.75% for subordinate lien loans, above the average commitment rate for loans in the northeast region based upon rates published weekly by Freddie Mac.²⁰⁶

Section 6-1 of the Banking Law contains a number of provisions designed to protect the homeowner at the time that home loans are entered into, and particularly, imposes upon the lender the due diligence obligation of inquiring into the truth of loan application statements and the ability of the borrower to repay subprime and high-cost loans.²⁰⁷ Banking Law section 6-1(2)(l)(i), called the “Counseling Statute,”²⁰⁸ requires that at the time of the loan application, the “lender or mortgage broker . . . deliver, place in the mail, fax, or electronically transmit . . . [a] notice in at least twelve point type” stating: “You should consider financial counseling prior to executing loan documents. The enclosed list of counselors is provided by the New York State Banking Department.”²⁰⁹ Additionally, the lender or mortgage broker must provide the borrower, within three days after determining that the loan is high-cost and at least ten days before the closing, a further notice advising the borrower to shop and compare loan rates and fees, consult an independent credit counselor or other experienced financial advisor, and to be aware that the home could be lost in the

(2) Any and all bona fide loan discount points funded directly or indirectly through a grant from a federal, state or local government agency or 501(c)(3) organization.
Id. § 6-1(1)(g).

²⁰⁶ *Id.* § 6-m(1)(c) (“[A] subprime home loan [is defined as] a home loan in which the initial interest rate or the fully-indexed rate, whichever is higher, exceeds by more than one and three-quarters percentage points for a first-lien loan, or by more than three and three-quarters percentage points for a subordinate-lien loan, the average commitment rate for loans in the northeast region with a comparable duration to the duration of such home loan, as published by the Federal Home Loan Mortgage Corporation (herein ‘Freddie Mac’) in its weekly Primary Mortgage Market Survey (PMMS) posted in the week prior to the week in which the lender provides the ‘good faith estimate’ required under 12 USC § 2601 *et seq.* The term ‘subprime home loan’ excludes a transaction to finance the initial construction of a dwelling, i.e., a construction only loan, a temporary or ‘bridge’ loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months, or a home equity line of credit but shall include any loan, however structured, that thereafter is converted into a permanent loan.” (italics added)).

²⁰⁷ *LaSalle Bank, N.A. v. Shearon*, 19 Misc. 3d 433, 441, 850 N.Y.S.2d 871, 877 (Sup. Ct. Richmond County 2008), *adhered to on reargument*, 23 Misc. 3d 959, 881 N.Y.S.2d 599 (Sup. Ct. Richmond County 2009) (stating that Banking Law section 6-1(2)(k) “deals with the plaintiff’s due diligence into the ability of the defendants to repay the loan”); *see* BANKING LAW § 6-1(2)(k).

²⁰⁸ *Shearon*, 19 Misc. 3d at 440, 850 N.Y.S.2d at 876 (emphasis removed).

²⁰⁹ BANKING LAW § 6-1(2)(l)(i).

event mortgage payment obligations are not met.²¹⁰

Section 6-m of the Banking Law also contains a number of provisions designed to protect the homeowner.²¹¹ Subprime home mortgages must contain a legend at the top of the mortgage identifying the mortgage as subprime, in twelve-point type.²¹²

Section 6-l of the Banking Law was originally enacted in 2002, effective on April 1, 2003.²¹³ However, the statute has undergone amendments in 2007,²¹⁴ 2008,²¹⁵ 2009,²¹⁶ and 2011.²¹⁷ The statute's more recent amendments were responsive to New York's residential mortgage foreclosure crisis. Section 6-m of the Banking Law is a more recent invention, having been initially enacted and made effective in 2008,²¹⁸ with two sets of amendments in 2009,²¹⁹ and one in 2011.²²⁰ Various amendments to Banking Law sections 6-l and 6-

²¹⁰ *Id.* § 6-l(2)(l)(ii). The actual text of the required notice reads as follows:

CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE

If you obtain this loan, which pursuant to New York State Law is a High-Cost Home Loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

You should shop around and compare loan rates and fees. Mortgage loan rates and closing costs and fees vary based on many factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. The loan rate and fees could vary based on which lender or mortgage broker you select. Higher rates and fees may be related to the individual circumstances of a particular consumer's application.

You should consider consulting a qualified independent credit counselor or other experienced financial advisor regarding the rate, fees, and provisions of this mortgage loan before you proceed. The enclosed list of counselors is provided by the New York State Banking Department.

You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application. If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

Id. (emphasis added) (internal quotation marks omitted).

²¹¹ See generally *id.* § 6-m(2) (listing a number of prohibited practices for subprime home loans).

²¹² *Id.* § 6-m(5).

²¹³ See Act of Oct. 3, 2002, ch. 626, § 4, 2002 N.Y. Laws 3560, 3566.

²¹⁴ Act of Aug. 15, 2007, ch. 552, 2007 N.Y. Laws 3319.

²¹⁵ Act of Aug. 5, 2008, ch. 472, 2008 N.Y. Laws 3604.

²¹⁶ Act of Dec. 15, 2009, ch. 507, 2009 N.Y. Laws 1384.

²¹⁷ See Act of Mar. 31, 2011, ch. 62, 2011 N.Y. Laws 547.

²¹⁸ Act of Aug. 5, 2008, ch. 472, § 5, 2008 N.Y. Laws at 3609–13.

²¹⁹ Act of Dec. 15, 2009, ch. 507, §§ 14, 15, 2009 N.Y. Laws at 1395, 1397.

²²⁰ See Act of Mar. 31, 2011, ch. 62, § 104, 2011 N.Y. Laws at 587. Section 6-m of the Banking Law was recently amended. Act of Aug. 17, 2012, ch. 404 § 303, 2012 N.Y. Sess.

m, RPAPL sections 1303 and 1304, RPL section 265-a, and CPLR section 3408 to be discussed *infra*, were contained in the same chapters of the New York State Session Laws in 2008, 2009, and 2011, reflecting the inter-relatedness of the provisions of HETPA.

Banking Law sections 6-l and 6-m both impose upon the lender or mortgage broker the good faith obligation to determine whether the borrower has the ability to repay the loan, along with real estate taxes and hazard insurance.²²¹ The language on this point in Banking Law section 6-l is the stronger of the two, requiring the lender or mortgage broker to specifically consider the borrower's current and expected income, current obligations, employment status, and other financial resources "*as verified by detailed documentation . . . and corroborated by independent verification.*"²²² Both statutes prohibit lenders and mortgage brokers from engaging in a laundry list of prohibited activities, such as, *inter alia*, debt acceleration,²²³ negative amortization,²²⁴ increasing interest rates upon a default,²²⁵ placing limitations on advance payments,²²⁶ imposing unfair mandatory arbitration clauses,²²⁷ requiring the financing of insurance and other product fees,²²⁸ "flipping" loans,²²⁹ encouraging defaults,²³⁰ making prohibited payments to loan brokers,²³¹ hiding real estate tax and insurance costs on the property,²³² charging modification fees,²³³ imposing prepayment penalties,²³⁴ or abusive yield spread premiums,²³⁵ and offering "teaser rates."²³⁶ Certain provisions of the law have been applied to individual lenders, in addition to institutional lenders and mortgage

Laws 1141 (McKinney).

²²¹ See N.Y. BANKING LAW §§ 6-1(2)(k), 6-m(4) (McKinney 2013).

²²² See *id.* § 6-1(2)(k) (emphasis added). The provision provides for a rebuttable presumption that there was due regard for repayment ability if at the time the loan is consummated, the borrower's monthly debts, including the amounts due under the loan, do not exceed 50% of the borrower's monthly gross income. *Id.*

²²³ *Id.* §§ 6-1(2)(a), 6-m(2)(a).

²²⁴ *Id.* §§ 6-1(2)(c), 6-m(2)(b).

²²⁵ *Id.* §§ 6-1(2)(d), 6-m(2)(c).

²²⁶ *Id.* §§ 6-1(2)(e), 6-m(2)(d).

²²⁷ *Id.* §§ 6-1(2)(g), 6-m(2)(f).

²²⁸ See *id.* §§ 6-1(2)(h), 6-m(2)(g).

²²⁹ *Id.* §§ 6-1(2)(i), 6-m(2)(h).

²³⁰ *Id.* §§ 6-1(2)(o), 6-m(2)(k).

²³¹ *Id.* §§ 6-1(2)(p), 6-m(2)(l).

²³² See *id.* §§ 6-1(2)(u), 6-m(2)(p).

²³³ *Id.* §§ 6-1(2)(f), 6-m(2)(e).

²³⁴ *Id.* §§ 6-1(2)(r), 6-m(2)(m).

²³⁵ See *id.* §§ 6-1(2)(s), 6-m(2)(n).

²³⁶ *Id.* §§ 6-1(2)(v), 6-m(2)(q).

brokers.²³⁷

Banking Law section 6-l(10) requires that if a lender intentionally violates the Banking Law, the home loan agreement entered into with the customer is rendered void, the lender forfeits its right to collect or retain any principal, interest, or other charges, and the homeowner may affirmatively recoup any payments made under the agreement.²³⁸ Banking Law section 6-l(11) also provides that if a court finds that the lender has committed any violation of the statute, the homeowner may rescind the loan agreement.²³⁹ Most violations of the statute, which are determined by a court to exist under a preponderance of the evidence standard, entitle the borrower to an award of actual damages,²⁴⁰ interest, points and fees,²⁴¹ and attorneys' fees.²⁴² Even greater penalties may be imposed if the lender or mortgage broker engages in "loan flipping" or fails to make the required good faith determination of the borrower's repayment ability, and is punishable in those instances by fines of \$5,000 per violation or twice the amount of points, fees and closing costs, whichever is greater,²⁴³ with attorneys' fees.²⁴⁴ Similarly, a violation of the limiting provisions of Banking Law section 6-m renders a subprime home mortgage void,²⁴⁵ and in such instances, the borrower is entitled to actual damages,²⁴⁶ attorneys' fees,²⁴⁷ and injunctive, declaratory, or other equitable relief.²⁴⁸

The Supreme Court, Suffolk County, considered the question of whether compliance with the provisions of Banking Laws sections 6-l or 6-m are conditions precedent to a lender's recovery for a high-cost or subprime loan default.²⁴⁹ In the action, *Emigrant Mortgage*

²³⁷ See *Balsam v. Fioriglio*, 30 Misc. 3d 400, 402–03, 914 N.Y.S.2d 863, 865–66 (Sup. Ct. Kings County 2010).

²³⁸ See BANKING LAW § 6-l(10); *LaSalle Bank, N.A. v. Shearon*, 19 Misc. 3d 433, 436–37, 850 N.Y.S.2d 871, 874 (Sup. Ct. Richmond County 2008).

²³⁹ BANKING LAW § 6-l(11).

²⁴⁰ *Id.* § 6-l(7)(a).

²⁴¹ *Id.* § 6-l(7)(b).

²⁴² *Id.* § 6-l(8).

²⁴³ *Id.* § 6-l(7)(b)(ii)(1).

²⁴⁴ *Id.* § 6-l(8).

²⁴⁵ *Id.* § 6-m(3). However, if the lender or mortgage broker violates the statute as a result of good faith error, and promptly notifies the borrower of the complained failure and makes restitution adjustments, the subprime mortgage agreement need not be voided. See *id.* § 6-m(7).

²⁴⁶ *Id.* § 6-m(9).

²⁴⁷ *Id.* § 6-m(10).

²⁴⁸ *Id.* § 6-m(11).

²⁴⁹ See *Emigrant Mortg. Co. v. Fitzpatrick*, 29 Misc. 3d 746, 754–55, 906 N.Y.S.2d 874, 881–82 (Sup. Ct. Suffolk County 2010) (holding that the plaintiff did not comply with Banking Law sections 6-l or 6-m and dismissing plaintiff's motion for summary judgment),

Co. v. Fitzpatrick, the plaintiff mortgage company failed to establish whether the loan in question was high-cost or subprime,²⁵⁰ and in either event, failed to prove that they complied with either of the relevant Banking Laws.²⁵¹ The supreme court treated compliance with Banking Law sections 6-l and 6-m as a requirement for summary judgment, and on that basis, denied the plaintiff's motion for summary judgment.²⁵² Since compliance with other statutes of HETPA, such as RPAPL sections 1303 and 1304, have been held on appeal to be conditions precedent to plaintiffs' recoveries,²⁵³ the same can arguably be said of the requirements of Banking Law sections 6-l and 6-m.²⁵⁴

The Supreme Court, Richmond County, in the case of *LaSalle Bank v. Shearon*, also denied a motion for summary judgment by the plaintiff bank on the ground of non-compliance with Banking Law section 6-l.²⁵⁵ Whereas in *Fitzpatrick*, the plaintiff mortgage company failed to prove compliance with the Banking Law,²⁵⁶ in *Shearon*, documentary evidence established actual non-compliance with certain provisions of Banking Law section 6-l.²⁵⁷ On its face, the subject mortgage in *Shearon* reflected interest and fees that qualified the loan as "high cost," and the supreme court found non-compliance by the bank with its obligations to determine the borrower's ability to repay the loan,²⁵⁸ to provide a list of credit counselors,²⁵⁹ and to not finance excessive points and fees, as all required by Banking Law sections 6-l(2)(k), 6-l(2)(l)(ii), and 6-l(2)(m).²⁶⁰ The supreme court scheduled further proceedings to determine damages.²⁶¹

As of this writing, disputed provisions of the Banking Law, as relevant to HETPA, have not reached any appellate court, and the threadbare case law generated pursuant to the statute has to date

order rev'd by 95 A.D.3d 1169, 945 N.Y.S.2d 697 (App. Div. 2d Dep't 2012).

²⁵⁰ *Id.* at 751, 906 N.Y.S.2d at 879.

²⁵¹ *Id.* at 754–55, 906 N.Y.S.2d at 881–82.

²⁵² *Id.* at 751, 752, 906 N.Y.S.2d at 879–80.

²⁵³ See *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 98, 923 N.Y.S.2d 609, 611 (App. Div. 2d Dep't 2011); *First Nat'l Bank of Chi. v. Silver*, 73 A.D.3d 162, 169, 899 N.Y.S.2d 256, 261 (App. Div. 2d Dep't 2010).

²⁵⁴ See *Fitzpatrick*, 29 Misc. 3d at 751, 752, 906 N.Y.S.2d at 879–80.

²⁵⁵ *LaSalle Bank, N.A. v. Shearon*, 19 Misc. 3d 433, 434, 850 N.Y.S.2d 871, 872 (Sup. Ct. Richmond County 2008).

²⁵⁶ *Fitzpatrick*, 29 Misc. 3d at 751, 752, 906 N.Y.S.2d at 879–80.

²⁵⁷ *Shearon*, 19 Misc. 3d at 441, 850 N.Y.S.2d at 877.

²⁵⁸ *Id.* at 441, 850 N.Y.S.2d at 877.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 441–42, 850 N.Y.S.2d at 877–78.

²⁶¹ *Id.* at 443, 850 N.Y.S.2d at 878–79.

been limited to trial-level courts.²⁶² It is only a matter of time before cases involving Banking Law sections 6-l and 6-m reach the appellate courts for further interpretation.

VI. MANDATORY SETTLEMENT CONFERENCES UNDER CPLR SECTION 3408

This author published an extensive law review article in 2010 specific to residential mortgage foreclosure settlement conferences mandated by the newly-enacted CPLR section 3408. The article is titled *The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect*,²⁶³ and the reader is recommended to it for a detailed discussion of the mechanics of the statute.

In sum, CPLR section 3408, which was first enacted effective August 5, 2008,²⁶⁴ and amended effective February 13, 2010,²⁶⁵ requires that a settlement conference be conducted in all residential foreclosure actions in an effort to keep families in their homes by adjusting payment schedules or the amounts due upon defaulted mortgages.²⁶⁶ Indeed, the statute uses the terms “settlement,”

²⁶² See e.g., *Fitzpatrick*, 29 Misc. 3d 746, 906 N.Y.S.2d 874; *Shearon*, 19 Misc. 3d 433, 850 N.Y.S.3d 871.

²⁶³ Mark C. Dillon, *The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but not Legislatively Perfect*, 30 PACE L. REV. 855 (2010).

²⁶⁴ Act of Aug. 5, 2008, ch. 472, §§ 3, 28, 2008 N.Y. Laws 3604, 3607, 3627; *Wells Fargo Bank, NA v. Edsall*, No. 3523-07, 2009 WL 175029, at *3 (Sup. Ct. Suffolk County Jan. 22, 2009).

²⁶⁵ See Act of Dec. 15, 2009, ch. 507, § 25, 2009 N.Y. Laws 1384, 1401; Press Release, Gov. David A. Paterson, Governor Patterson Signs Comprehensive Foreclosure Legislation Into Law (Dec. 15, 2009), available at http://www.state.ny.us/governor/press/press_12150901.html (discussing important provisions of the law).

²⁶⁶ See N.Y. C.P.L.R. 3408(a) (McKinney 2013). See also David D. Siegel, *Practice Commentaries*, C3408:28, in C.P.L.R. 3408; David D. Siegel, *Legislature Mandates Settlement Conference in Residential Foreclosure Actions in Effort to Ease Subprime Mortgage Crisis*, 201 SIEGEL'S PRAC. REV. 3 (Sep. 2008) [hereinafter Siegel, *Legislature Mandates Settlement Conference*]. There is no statutory predecessor to CPLR section 3408. However, the New York State Office of Court Administration was one step ahead of the state's legislature in recognizing the potential value of residential mortgage foreclosure settlement conferences. Then-Chief Judge Judith Kaye and then-Chief Administrative Judge Ann Pfau issued a report titled *Residential Mortgage Foreclosures: Promoting Early Court Intervention* in June of 2008, before the collapse of the housing market, which expressed concern over the increase in residential foreclosure cases up to that point in time, and the effect that foreclosures would have upon families, neighborhoods, banks, and the economy. See JUDITH S. KAYE & ANN PFAU, RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTING EARLY COURT INTERVENTION, 1-2 (2008) available at <http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf>. It proposed the creation of an Early Foreclosure Conference Part, as a pilot program in the Supreme Court, Queens County where, under local rules, a homeowner could request a court conference pursuant to a written notice served with the plaintiff's summonses and

“resolution,” and “agreed to” five times, underscoring the legislature’s intent that the conferences be used to foster the amicable resolution of foreclosure litigations that protect the interests of lenders to recoup money due and the interests of families in retaining possession of their homes.²⁶⁷

The statute was enacted as a legislative reaction to the significant spike that had occurred in residential mortgage defaults as a result of broader economic difficulties that arose during the fall of 2008 and the specific crash of the New York housing market.²⁶⁸ While the statute was not made retroactive;²⁶⁹ it prospectively mandated settlement conferences in all residential mortgage foreclosure actions that implicated “subprime loans,”²⁷⁰ “nontraditional home loans,”²⁷¹ and “high-cost home loans.”²⁷² The statute’s subsequent amendment expanded its scope to all residential mortgage foreclosure actions, not just those that involved subprime, nontraditional, and high-cost home loans.²⁷³ The statute does not apply to investment properties, as it is expressly made applicable to homes “in which the defendant is a resident of the property subject

complaints. *Id.* at 3–4. The conference was to be held within sixty days from the filing of the plaintiff’s request for judicial intervention, which is purchased at the time that summonses and complaints are filed with the county clerk. *Id.* at 2–3. The purpose of the conferences would have been to streamline foreclosure litigations for lenders and encourage settlements between the parties that would, in a certain number of cases, succeed in keeping defendants in their homes. *See id.* at 1–2. Shortly thereafter, the state legislature’s enactment of CPLR section 3408 caused the pilot program in Queens County to be subsumed by the statute that had statewide application, and which accomplished what the pilot program in Queens County was intended to provide to lenders and homeowners.

²⁶⁷ Dillon, *supra* note 263, at 858–59; *see* C.P.L.R. 3408.

²⁶⁸ Siegel, *Legislature Mandates Settlement Conference*, *supra* note 266.

²⁶⁹ *See* HSBC Bank USA, N.A. v. Abass, No. 11254/2008, 2011 WL 2586375, at *3 (Sup. Ct. Queens County June 29, 2011) (holding that the effective date of the statute was after the filing and thus not retroactively applicable); Countrywide Home Loans, Inc. v. Septimus, No. 22040/2007, 2011 WL 2202010, at *2 (Sup. Ct. Queens County June 6, 2011) (holding the action was commenced prior to the effective date and thus CPLR section 3408 was not applicable); LaSalle Bank Nat’l Ass’n v. Novetti, No. 6535-08, 2009 WL 1810511, at *2 (Sup. Ct. Suffolk County June 15, 2009) (holding that because the action was commenced prior to the effective date of CPLR section 3408, the defendant was not entitled to a voluntary conference).

²⁷⁰ *See* C.P.L.R. 3408(a) (mandating settlement conferences for certain types of home mortgage loans); N.Y. REAL PROP. ACTS. LAW § 1304(5)(c) (McKinney 2012) (describing subprime home loans).

²⁷¹ *See* C.P.L.R. 3408(a); REAL PROP. ACTS. LAW § 1304(5)(e).

²⁷² C.P.L.R. 3408(a); N.Y. BANKING LAW § 6-1(1)(d) (McKinney 2013); Accredited Home Lenders, Inc. v. Hughes, 22 Misc. 3d 323, 325, 866 N.Y.S.2d 860, 862 (Sup. Ct. Essex County 2008).

²⁷³ *See* C.P.L.R. 3408(a); Act of Dec. 15, 2009, ch. 507, § 9(a), 2009 N.Y. Laws 1384, 1392; David D. Siegel, *Major Bill on Mortgage Foreclosure Problem Expands on the Conference that CPLR 3408 Mandates*, 217 SIEGEL’S PRAC. REV. 2 (Jan. 2010).

to foreclosure.”²⁷⁴ The expansion of the statute to all residential home loans is subject to a “sunset” provision.²⁷⁵ The amended version remains in effect for only five years measured from the effective date of the 2009 version of CPLR section 3408(a), at which time the statute reverts to its original 2008 form that limits the mandatory residential mortgage foreclosure conferences to only subprime, non-traditional, and high-cost residential mortgages.²⁷⁶ Since the 2009 amendment had an effective date of February 13, 2010, the sunset provision triggers on February 13, 2015.²⁷⁷ CPLR section 3408 requires that the settlement conference be conducted with the court within sixty days after the date that proof of service of process is filed with the county clerk, or on a mutually-agreeable adjourned date.²⁷⁸ The statute presupposes that plaintiffs will meet their burden of filing affidavits of service with the clerk of the court, not only where such affidavits are statutorily required for service performed under CPLR section 308(2) (suitable age and discretion service) and CPLR section 308(4) (“nail and mail” service), but also, where such filings are not statutorily required, such as when service is performed personally under CPLR section 308(1) and upon and agent under CPLR section 308(3).²⁷⁹ Any concern that the

²⁷⁴ See C.P.L.R. 3408(a); *Indymac Federal Bank FSB v. Black*, No. 226806, 2009 WL 211787, at *1 (Sup. Ct. Rensselaer County Jan. 23, 2009); see also Dillon, *supra* note 263, at 864 (discussing the residency requirement of CPLR section 3408).

²⁷⁵ C.P.L.R. 3408(a).

²⁷⁶ See Act of Dec. 15, 2009, ch. 507, § 25(e), 2009 N.Y. Laws at 1400–01. The presence of this sunset provision might reflect legislative optimism that the state will emerge from the difficulties currently experienced in the residential housing market.

²⁷⁷ See *id.* § 25; C.P.L.R. 3408(a). A full text of the current operative sub-paragraph of the statute reads as follows:

[Eff. until Feb. 13, 2015, pursuant to L.2009, ch. 507, sec. 25, subd. e] In any residential foreclosure action involving a home loan as such term is defined in 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 county clerk, or on such adjourned date as had 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.

C.P.L.R. 3408(a).

²⁷⁸ *Id.*

²⁷⁹ Compare N.Y. C.P.L.R. 308(2) (McKinney 2013) and C.P.L.R. 308(4) (setting out the statutory requirements of forms of service), with C.P.L.R. 308(1) and C.P.L.R. 308(3) (requiring service be on a person within the state or an agent within the state). Plaintiffs are only required to file affidavits of service with the clerk of the court when service is accomplished pursuant to CPLR sections 308(2) and 308(4). See Dillon, *supra* note 263, at

mandatory settlement conferences will not be scheduled, in cases where the filing of an affidavit of service is not required, is alleviated to some extent by Rule 202.12-a of the Rules of the Chief Administrator. Rule 202.12-a(b) provides that foreclosure plaintiffs file a specialized request for judicial intervention (“RJI”) with their summonses and complaints,²⁸⁰ and the filing of the RJI has the administrative effect of triggering the scheduling of the settlement conferences, regardless of whether the plaintiffs file an affidavit of service with the county clerk.²⁸¹ Since meaningful settlement conferences for residential mortgage foreclosures almost always require more than one session, and in many instances require several sessions,²⁸² the statute placed a noticeable but necessary new burden upon the courts of the state. Meaningful mortgage foreclosure settlement conferences are time and labor intensive.²⁸³ Success rates depend upon a variety of factors such as the facts of the case, the financial circumstances of the defendants, the goals of the parties, the reasonableness and flexibility of the parties, the negotiating experience of persons at the conference table, and the experience and quality of the parties’ attorneys and the assigned judge, court attorney, or referee.²⁸⁴ The legislature appropriated no funding to assist the state courts in meeting their new settlement conference obligations.²⁸⁵ To the extent that CPLR section 3408 also statutorily deems *pro se* parties to be indigent and eligible for assigned counsel, the state provided no funding for such appointed counsel.²⁸⁶ For this reason, both the New York State Senate and Assembly were able to declare CPLR section 3408 as being “revenue neutral,”²⁸⁷ despite the obvious additional burden that it and its

877 (explaining methods of personal service).

²⁸⁰ See N.Y. COMP. CODES R. & REGS. tit 22, § 202.12-a(b)(1) (2013) (stating that at time of summons and complaint, “the plaintiff shall file with the clerk a specialized request for judicial intervention”).

²⁸¹ See *id.* § 202.12-a(c)(1) (explaining the procedures for a settlement conference).

²⁸² See *id.* § 202.12-a(c)(6) (stating that the court may schedule any conferences they deem necessary to help resolve the action).

²⁸³ See Dillon, *supra* note 263 at 889 (explaining that multiple conferences take place before a settlement is reached, resulting in a “lag” time between conferences and settlements).

²⁸⁴ See, e.g., Dillon, *supra* note 263, at 887, 888.

²⁸⁵ *Id.* at 891.

²⁸⁶ See N.Y. C.P.L.R. 3408(b) (McKinney 2013); N.Y. C.P.L.R. 1101(a) (McKinney 2013).

²⁸⁷ See S. B. S66007, 2009 S., 20th Extraordinary Sess. (N.Y. 2009) (“BUDGET IMPLICATIONS: This bill will not have an impact on State finances.”); Assemb. B. A40007, 2009 Assemb., 20th Extraordinary Sess. (N.Y. 2009) (“BUDGET IMPLICATIONS: This bill will not have an impact on State finance.”).

amendment places upon the limited resources of the courts.²⁸⁸

The Rules of the Chief Administrator provide some additional detail as to the requirements and procedures of the residential mortgage foreclosure settlement conferences.²⁸⁹ The rules define the documents that are to be produced at the conference for use by the parties and the court.²⁹⁰ And perhaps controversially, the rules provide that the Chief Administrative Judge may “require counsel to file affidavits or affirmations confirming the scope of inquiry and the accuracy of papers filed in residential mortgage foreclosure actions,”²⁹¹ which will be discussed in more detail later in this article.²⁹²

Of course, while the state legislature could statutorily require that settlement conferences be held, there is no mechanism by which to mandate that the conferences always be successful. CPLR section 3408 provides that both the plaintiff and the defendant “shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.”²⁹³ The rules of the Chief Administrator similarly require that parties participate in the settlement conferences “in good faith to reach a mutually agreeable resolution.”²⁹⁴

The extent to which parties must work toward a settlement of foreclosure actions, and the fallout from a party’s failure to negotiate in “good faith,” was addressed by the Second Department in *Indymac Bank, F.S.B. v. Yano-Horoski*.²⁹⁵ In *Yano-Horoski*, a post-judgment settlement conference was conducted with the

²⁸⁸ See Dillon, *supra* note 263, at 887.

²⁸⁹ See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12-a (2013).

²⁹⁰ See *id.* § 202.12-a(c)(5). Under the rule, the documents that the lender must produce at the conference include: “current payoff and reinstatement documents; [the] mortgage and note; [the homeowner’s] payment history; workout forms or packet; copies of any recent paperwork regarding reinstatement, settlement offers or loan modification proposals; and an itemization of the amounts needed to cure and pay off the loan.” *Id.* § 202.12-a(c)(5)(i). The documents that the homeowner must produce at the conference include: “current income documentation, including pay stubs and benefits information; [a] list of monthly expenses; recent mortgage statements, property tax statements, and income tax returns; loan resolution proposals; and any information from previous workout attempts.” *Id.* § 202.12-a(c)(5)(ii).

²⁹¹ See *id.* § 202.12-a(f).

²⁹² See discussion *infra* Part VII.

²⁹³ N.Y. C.P.L.R. 3408(f) (McKinney 2013); *US Bank Nat’l Ass’n v. Padilla*, No. 8979/09, 2011 WL 1348387, at *2 (Sup. Ct. Dutchess County Apr. 8, 2011); *BAC Home Loans Servicing v. Westervelt*, No. 2455/10, 2010 WL 4702276, at *3 (Sup. Ct. Dutchess County Nov. 18, 2010).

²⁹⁴ COMP. CODES R. & REGS. tit. 22, § 202.12-a(c)(4) (2013).

²⁹⁵ *IndyMac Bank, F.S.B. v. Yano-Horoski*, 78 A.D.3d 895, 912 N.Y.S.2d 239 (App. Div. 2d Dep’t 2010).

consent of all parties at the Supreme Court, Suffolk County.²⁹⁶ The assigned justice concluded that the plaintiff bank was not negotiating the matter in good faith, and *sua sponte* vacated the judgment of foreclosure and sale, cancelled the mortgage and note in their entirety, and directed that the county clerk cancel the filed notice of pendency.²⁹⁷ On appeal, the Second Department held that the sanctions were not authorized by any statute or court rule, and the plaintiff bank had not been given fair warning that sanctions were under consideration.²⁹⁸ More significantly, as relevant here, the appellate division held that the supreme court's belief that it possessed equitable powers to cancel the mortgage and note after the judgment had already been rendered, despite the homeowners' obligations to the bank, was erroneous.²⁹⁹ The message to the trial courts, therefore, is that while certainly nothing prohibits the use of gentle persuasion to bring foreclosure parties to amicable resolutions, courts may not exceed their authority by imposing unauthorized sanctions or by ignoring the parties' ultimate enforceable contractual rights and obligations.³⁰⁰ Sanctions, if any, may be imposed only upon notice with an opportunity to be heard, limited to the reasons set forth in Rules 130-1.1 and 130-1.2 of the Rules of the Chief Administrator.³⁰¹

If a court in New York fails to provide a defendant party the mandated foreclosure settlement conference under CPLR section 3408, and the defendant defaults in the action, the absence of the settlement conference does not provide a basis in and of itself for vacating the default judgment.³⁰² The reason is that the court's failure to provide a conference does not address the requirements of CPLR section 5015(a)(1) for vacating defaults, such as whether the defendant can reasonably excuse the failure to answer a complaint or appear at later scheduled proceedings, and whether the defendant has a meritorious defense to the action.³⁰³

²⁹⁶ *Id.* at 895, 896, 912 N.Y.S.2d at 240.

²⁹⁷ *Id.* at 896, 912 N.Y.S.2d at 240.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 896, 912 N.Y.S.2d at 241.

³⁰⁰ *See id.*

³⁰¹ *See* N.Y. COMP. CODES R. & REGS. tit. 22 §§ 130-1.1(b), 130-1.2 (2013).

³⁰² *Accord* Deutsche Bank Nat'l Trust Co. v. Pietranico, 33 Misc. 3d 528 at 533–34, 928 N.Y.S.2d 818, 822 (Sup. Ct. Suffolk County 2011) (holding that improper service was not a valid reason for vacating a default judgment); Onewest Bank FSB v. Berry, No. 8819-09, 2009 WL 3417852, at *2 (Sup. Ct. Suffolk County Oct. 23, 2009). *But see* JPMorgan Chase Bank, N.A. v. Sosa, No. 3072/08, 2011 WL 1348395, at *2 (Sup. Ct. Dutchess County April 8, 2011).

³⁰³ N.Y. C.P.L.R. 5015(a)(1) (McKinney 2013).

VII. ATTORNEY AFFIRMATION REQUIREMENTS

The appellate divisions throughout the state have not yet had occasion to pass upon a rule promulgated by Chief Judge Jonathan Lippman requiring attorney affirmations in residential mortgage foreclosure actions.

On October 20, 2010, Chief Judge Jonathan Lippman promulgated Administrative Order 540/10 requiring that statewide attorneys filing papers in residential mortgage foreclosure actions include an affirmation attesting to the papers' integrity.³⁰⁴ Specifically, under the new rule, attorneys were to certify with their filings, under the penalties of perjury, that they undertook reasonable steps to verify the accuracy of their documents, such as by making inquiry of banks and lenders, and by personally and carefully reviewing mortgage-related papers themselves.³⁰⁵ The rule was promulgated in response to the document deficiencies that arose from the widespread use of "robosigning" and mass notarizations.³⁰⁶ It has since been replaced by Administrative Order 431/11.³⁰⁷ The evident purpose of the original and superseding rule is to assure higher standards of accuracy in the actions, where the defendants' possession of their homes is necessarily at stake.

The new rule is unpopular with bank attorneys, as they complain that they cannot always verify the accuracy of documentation prepared by their clients, that the new procedures further slow the

³⁰⁴ See David D. Siegel, *Practice Commentaries*, C3408, in N.Y. C.P.L.R. 3408 (McKinney 2013); *Deutsche Bank Nat'l Trust Co. v. Ramotar*, No. 1730/2009, 2011 WL 66041, at *2 (Sup. Ct. Queens County Jan. 10, 2011); *Wash. Mut. Bank v. Phillip*, No. 16359/08, 2010 WL 4813782, at *2 (Sup. Ct. Kings County Nov. 29, 2010); see also Andrew Keshner, *New Court Rule Says Attorneys Must Verify Foreclosure Papers*, N.Y.L.J., Oct. 21, 2010, at 1. The so called "attorney affirmation" rule is not specifically contained at all in the Rules of the Chief Administrator, but is instead a mere "administrative order" authorized by the rule.

³⁰⁵ See *Citibank, N.A. v. Murillo*, 30 Misc. 3d 934, 936-97, 915 N.Y.S.2d 461, 463 (Sup. Ct. Kings County 2011); Keshner, *supra* note 304. The template language for the attorney affirmation reads as follows:

Based on my communication with [plaintiff's representative], as well as upon my own inspection and other reasonable inquiry . . . [of the papers filed with the court and other diligent inquiry,] I affirm that, to the best of my knowledge, information, and belief, the Summons and Complaint, and all other papers filed . . . [in support of the action for foreclosure] contain no false statements of fact or law. I understand my continuing obligation to amend this Affirmation in light of newly discovered facts following its filing. Administrative Order of the Chief Administrative Judge of the Courts, A.O. 431/11, Mar. 2, 2011 [hereinafter Administrative Order].

³⁰⁶ Keshner, *supra* note 304.

³⁰⁷ Administrative Order, *supra* note 305. See also *HSBC Bank USA, N.A. v. Cayo*, 34 Misc. 3d 850, 852, 934 N.Y.S.2d 792, 794 (Sup. Ct. Kings County 2011); *U.S. Bank Nat'l Ass'n v. Solorin*, 34 Misc. 3d 292, 293, 934 N.Y.S.2d 655, 655 (Sup. Ct. Queens County 2011).

litigation process, and that *per diem* attorneys are particularly disadvantaged by the requirement.³⁰⁸ Conversely, homeowner advocates have embraced the rule and argue that it should be strengthened by requiring that the attorney affirmation be filed at the time actions are commenced.³⁰⁹ Homeowner advocates allege that bank attorneys avoid complying with the attorney affirmation requirement by delaying the filing of RJIs which, in turn, delays the scheduling of CPLR section 3408 settlement conferences, resulting in a “shadow docket” of cases in a judicial limbo.³¹⁰

The required attorney affirmation must be submitted to the court “at the time of filing either the proposed order of reference or the proposed judgment of foreclosure.”³¹¹ The Second Department has interpreted the language of the administrative order as applicable only to proposed orders filed subsequent to the date the order went into effect, and not applicable to proposed orders that were already submitted to the court by the time the rule went into effect.³¹² One trial court has held that the attorney affirmation requirement must be satisfied with *every* filing in residential mortgage foreclosure actions,³¹³ even if doing so may appear duplicative. The wrongful filing and prosecution of residential mortgage foreclosure proceedings may be cause for disciplinary or other sanctions upon the participating counsel.³¹⁴

The attorney affirmation rule found its way into court decisions, with inconsistent effects. In *Citibank, N.A. v. Murillo*, the Supreme Court, Kings County, dismissed the plaintiff’s complaint, with prejudice, for the bank’s non-compliance with the rule.³¹⁵ Conversely, in *LaSalle Bank, N.A. v. Pace*,³¹⁶ the Supreme Court, Suffolk County, held that rule-making authority delegated by the state legislature to the chief judge cannot extend to the court’s responsibility to oversee the reception of evidence, the conduct of

³⁰⁸ See Keshner, *supra* note 304.

³⁰⁹ Andrew Keshner, Advocates Seek to Eliminate Foreclosure ‘Shadow Docket’, N.Y.L.J., Mar. 27, 2012, at 1.

³¹⁰ *Id.*

³¹¹ See Administrative Order, *supra* note 305; U.S. Bank, NA v. Boyce, 93 A.D.3d 782, 782, 940 N.Y.S.2d 656, 657 (App. Div. 2d Dep’t 2012); Citimortgage, Inc. v. McGee, 30 Misc. 3d 199, 200–01, 915 N.Y.S.2d 436, 437 (Sup. Ct. Suffolk County 2010).

³¹² See *Boyce*, 93 A.D.3d at 782, 940 N.Y.S.2d at 657.

³¹³ *McGee*, 30 Misc. 3d at 202, 915 N.Y.S.2d at 438.

³¹⁴ *Id.*

³¹⁵ *Citibank, N.A. v. Murillo*, 30 Misc. 3d 934, 936, 915 N.Y.S.2d 461, 463 (Sup. Ct. Kings County 2011).

³¹⁶ *LaSalle Bank, N.A. v. Pace*, 31 Misc. 3d 627, 919 N.Y.S.2d 794 (Sup. Ct. Suffolk County 2011).

counsel, instructions to juries, and issues raised in motions, and on that basis, the attorney affirmation rule was not to be followed.³¹⁷

It may merely be a matter of time before a decision and order of a supreme court, raising an attorney's non-compliance with the attorney affirmation rule, reaches an appellate division.

VIII. PROSCRIBING *SUA SPONTE* ACTIVITIES BY TRIAL COURTS

The role of trial level and appellate courts includes being a fair and objective arbiter of the factual and legal issues that divide parties in all cases, including mortgage foreclosure actions.³¹⁸ The role of the court is never to be an advocate for one party over another, pursue an agenda, or to act as *de facto* counsel for a party.³¹⁹ Some trial-level judges within the Second Department have dismissed complaints *sua sponte* for reasons outside of the issues raised in the motions before them. In one case where a motion had been filed for a default judgment, the trial judge demanded that the plaintiff bank provide an affidavit of a corporate officer explaining why, *inter alia*, the bank purchased a non-performing loan from an earlier servicer.³²⁰ When the bank did not strictly comply with the directive, the supreme court *sua sponte* dismissed the plaintiff's complaint and vacated the notice of pendency that had been filed.³²¹ The dismissal was reversed by the Second Department in the decision of *HSBC Bank USA, N.A. v. Valentin*, released on April 27, 2010.³²²

Fourteen days later, on May 11, 2010, the same trial justice rendered a decision and order on a motion in a different case where the plaintiff bank believed that the defendant was evading service of process, and where service could not accomplish despite due diligence.³²³ The bank had therefore moved for leave to serve the

³¹⁷ *Id.* at 636–37, 919 N.Y.S.2d at 803.

³¹⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(4) (2013).

³¹⁹ *See id.*

³²⁰ *See HSBC Bank USA, N.A. v. Valentin*, 72 A.D.3d 1027, 1029, 900 N.Y.S.2d 350, 352 (App. Div. 2d Dep't 2010).

³²¹ *Id.*

³²² *Id.* at 1027, 1028, 900 N.Y.S.2d at 350, 351.

³²³ *See U.S. Bank, Nat'l Ass'n v. Emmanuel*, 83 A.D.3d 1047, 1047, 1048, 921 N.Y.S.2d 320, 320, 321 (App. Div. 2d Dep't 2011). Judge Arthur M. Schack authored the lower court opinions in *HSBC Bank USA, N.A. v. Valentin* and *U.S. Bank, National Association v. Emmanuel*. *HSBC Bank USA, N.A. v. Valentin*, No. 15968/07, 2008 N.Y. Misc. LEXIS 6385, at *1 (Sup. Ct. Kings County Nov. 3, 2008), *rev'd*, 72 A.D.3d 1027, 900 N.Y.S.2d 350 (App. Div. 2d Dep't 2010); *U.S. Bank, N.A. v. Emmanuel*, No. 19271/09, 2010 N.Y. Misc. LEXIS 983, at *1 (Sup. Ct. Kings County May 11, 2010), *rev'd*, 83 A.D.3d 1047, 921 N.Y.S.2d 320 (App. Div. 2d Dep't 2011).

defendant by publication as authorized, in appropriate cases, by CPLR section 315.³²⁴ The trial court did not merely deny the motion for service by publication, but took matters a step further by performing its own internet investigation into the plaintiff's standing, and thereupon dismissed the complaint with prejudice and cancelled the notice of pendency.³²⁵ On appeal, the Second Department reversed, finding in *U.S. Bank, N.A. v. Emmanuel* that the lack of standing does not constitute a jurisdictional defense, and therefore, the court erred in its *sua sponte* dismissal of the plaintiff's complaint.³²⁶ In a third case by the same trial justice, the plaintiff bank sought leave to serve process by publication and for related relief.³²⁷ Once again, the justice directed the plaintiff to provide an affidavit by a certain date, this time addressing whether there was a conflict of interest for the plaintiff's counsel to simultaneously represent both the plaintiff and MERS.³²⁸ Of course, the conflict of interest, if any, was not jurisdictional for the court and did not bear upon the service of process issue that was raised by the defendant's motion. When the court received the requested affidavit one day late, the supreme court dismissed the plaintiff's complaint with prejudice and cancelled its notice of pendency.³²⁹ Again, in *U.S. Bank, N.A. v. Guichardo*, the Second Department reversed for similar reasons sets forth in the earlier cases.³³⁰

The foregoing cases are discussed here merely to illustrate that in instances where trial judges act on issues outside of the motions pending before them, or dispose of actions *sua sponte* under circumstances that do not permit such treatment, the appellate division has consistently reversed the dismissals of the complaints and restored the actions to the trial dockets.³³¹

³²⁴ *Emmanuel*, 83 A.D.3d at 1048, 921 N.Y.S.2d at 321.

³²⁵ See *Emmanuel*, 2010 N.Y. Misc. LEXIS 983, at *2-3, 13.

³²⁶ *Emmanuel*, 83 A.D.3d at 1048, 921 N.Y.S.2d at 322.

³²⁷ See *U.S. Bank, N.A. v. Guichardo*, No. 19086/08, 2009 N.Y. Misc. LEXIS 180, at *3 (Sup. Ct. Kings County Feb. 2, 2009), *rev'd*, 90 A.D.3d 1032, 935 N.Y.S.2d 335 (App. Div. 2d Dep't 2011). As in the cases noted in Footnote 324, Judge Arthur M. Shack authored this opinion as well. *Id.* at *1.

³²⁸ *U.S. Bank, N.A. v. Guichardo*, 90 A.D.3d 1032, 1032-33, 935 N.Y.S.2d 335, 336 (App. Div. 2d Dep't 2011).

³²⁹ *Id.* at 1033, 935 N.Y.S.2d at 336.

³³⁰ *Id.* at 1033, 935 N.Y.S.2d at 336-37 (stating that the Second Department here dismissed the case because the lower court had not provided the parties with any indication that the case would be dismissed if they failed to submit the requested documents in the specified time-frame).

³³¹ See discussion *supra* Part VIII.

*Tirado v. Miller*³³² provides guidance as to when and whether trial-level courts may determine issues on a *sua sponte* basis.³³³ Although *Tirado* was not an opinion rendered in the context of residential mortgage foreclosures, its principles apply to all forms of civil actions.³³⁴ As a general rule, trial judges should act *sua sponte* sparingly.³³⁵ The *Tirado* opinion notes that the law provides many instances where parties are statutorily entitled to be heard on issues before determinations are rendered, and other instances where courts have greater statutory latitude to act at their own initiative.³³⁶ The imposition of sanctions for frivolous conduct, for instance, requires that the recalcitrant party first be given notice and an opportunity to be heard.³³⁷ In *Indymac Bank, F.S.B. v. Yano-Horoski*, discussed previously in this article, the supreme court dismissed the plaintiff bank's complaint as a sanction for the bank's perceived failure or refusal to negotiate a CPLR section 3408 settlement in good faith.³³⁸ The dismissal was ordered *sua sponte*, without the bank being given notice that such a sanction was under consideration by the court, and without the bank having an opportunity to argue against the dismissal before it was ordered.³³⁹ The dismissal was reversed by the Appellate Division, Second Department, in what may be an excellent example of where trial should act *sua sponte* sparingly, and only when authorized to do so by law.³⁴⁰

The *Tirado* opinion provides further guidance on the issue of *sua sponte* activity by trial-level courts.³⁴¹ It acknowledged that when motions are filed and served in actions, moving parties typically include in the notice of motion a prayer for general relief, "for 'such other and further relief as [the] [c]ourt may deem just and proper.'"³⁴² General relief clauses permit courts to award "relief that is not too dramatically unlike that which is actually sought," so

³³² *Tirado v. Miller*, 75 A.D.3d 153, 901 N.Y.S.2d 358 (App. Div. 2d Dep't 2010).

³³³ *Id.* at 159–60, 901 N.Y.S.2d at 363–64.

³³⁴ *See id.* at 162, 901 N.Y.S.2d at 365.

³³⁵ *See id.* at 160, 901 N.Y.S.2d at 364.

³³⁶ *See id.* at 158–59, 901 N.Y.S.2d at 362–63.

³³⁷ *See id.* at 159, 901 N.Y.S.2d at 363 (citing N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2013); *Walker v. Weinstock*, 213 A.D.2d 631, 632, 624 N.Y.S.2d 193, 194 (App. Div. 2d Dep't 1995); *Breslaw v. Breslaw*, 209 A.D.2d 662, 662–63, 619 N.Y.S.2d 323, 324 (App. Div. 2d Dep't 1994)).

³³⁸ *Indymac Bank, F.S.B. v. Yano-Horoski*, 78 A.D.3d 895, 896, 912 N.Y.S.2d 239, 240 (App. Div. 2d Dep't 2010).

³³⁹ *Id.* at 896, 912 N.Y.S.2d at 240–41.

³⁴⁰ *Id.* at 895, 912 N.Y.S.2d at 240.

³⁴¹ *Tirado*, 75 A.D.3d at 158–60, 901 N.Y.S.2d at 362–64.

³⁴² *Id.* at 158, 901 N.Y.S.2d at 362 (alterations in original).

long as it “is supported by proof in the papers and the court is satisfied that no party is prejudiced.”³⁴³ Trial-level decisions and orders that have been reversed by the appellate division, such as *HSBC Bank USA, N.A. v. Valentin*,³⁴⁴ *U.S. Bank, N.A. v. Emmanuel*,³⁴⁵ and *U.S. Bank, N.A. v. Guichardo*,³⁴⁶ as previously discussed, all involved the dismissal of the plaintiffs complaints where the only relief requested in the plaintiffs’ motions had been either for default judgments or for service of process upon the defendants by means of publication.³⁴⁷ The dismissal of the plaintiff’s complaints in each instance, for reasons unrelated to the requested forms of relief, fell outside of the general relief clauses of the noticed motions.³⁴⁸ The message to trial judges in the realm of residential mortgage foreclosure actions, as well as in all other civil actions, is to not grant forms of relief that stray too far from the specific nature of the relief requested by the moving parties in their notices of motion.³⁴⁹

IX. CONCLUSIONS

Human interaction with others, being what it is, results in a never-ending variety of factual and legal issues that confront litigants and courts at both the trial and appellate levels. Since 2008, the New York State and national housing markets, and the economy more generally, have experienced significant weaknesses and stresses.³⁵⁰ These economic conditions have resulted in an

³⁴³ See *id.* (citing *Frankel v. Stavsky*, 40 A.D.3d 918, 918, 838 N.Y.S.2d 90, 91 (App. Div. 2d Dep’t 2007); *HCE Assocs. v. 3000 Watermill Lane Realty Corp.*, 173 A.D.2d 774, 774–75, 570 N.Y.S.2d 642, 643 (App. Div. 2d Dep’t 1991); *Lanaris v. Mut. Benefit Life Ins. Co.*, 9 A.D.2d 1015, 1015, 194 N.Y.S.2d 718, 718 (App. Div. 4th Dep’t 1959)).

³⁴⁴ *HSBC Bank USA, N.A. v. Valentin*, No. 15968/07, 2008 N.Y. Misc. LEXIS 6385, at *1 (Sup. Ct. Kings County Nov. 3, 2008), *rev’d*, 72 A.D.3d 1027, 900 N.Y.S.2d 350 (App. Div. 2d Dep’t 2010).

³⁴⁵ *U.S. Bank, N.A. v. Emmanuel*, No. 19271/09, 2010 N.Y. Misc. LEXIS 983, at *1 (Sup. Ct. New York County May 11, 2010), *rev’d*, 83 A.D.3d 1047, 921 N.Y.S.2d 320 (App. Div. 2d Dep’t 2011).

³⁴⁶ *U.S. Bank, N.A. v. Guichardo*, No. 19086/08, 2009 N.Y. Misc. LEXIS 180, at *3 (Sup. Ct. Kings County Feb. 2, 2009), *rev’d*, 90 A.D.3d 1032, 935 N.Y.S.2d 335 (App. Div. 2d Dep’t 2011)

³⁴⁷ *U.S. Bank, N.A. v. Emmanuel*, 83 A.D.3d 1047, 1048, 921 N.Y.S.2d 320, 321 (App. Div. 2d Dep’t 2011); *U.S. Bank, N.A. v. Guichardo*, 90 A.D.3d 1032, 1032, 1033, 935 N.Y.S.2d 335, 336 (App. Div. 2d Dep’t 2011); *HSBC Bank USA, N.A. v. Valentin*, 72 A.D.3d 1027, 1029, 900 N.Y.S.2d 350, 352 (App. Div. 2d Dep’t 2010).

³⁴⁸ See *Guichardo*, 90 A.D.3d at 1033, 935 N.Y.S.2d at 337; *Emmanuel*, 83 A.D.3d at 1048–49, 921 N.Y.S.2d at 321–22; *Valentin*, 72 A.D.3d at 1029, 900 N.Y.S.2d at 352.

³⁴⁹ See *Guichardo*, 90 A.D.3d at 1033, 935 N.Y.S.2d at 337; *Emmanuel*, 83 A.D.3d at 1048–49, 921 N.Y.S.2d at 321–22; *Valentin*, 72 A.D.3d at 1029, 900 N.Y.S.2d at 352.

³⁵⁰ Alan C. Weinstein, *Current and Future Challenges to Local Government Posed by the Housing and Credit Crisis*, 2 ALB. GOV’T L. REV. 259, 264 (2009).

influx of residential mortgage foreclosure actions, all of which are adjudicated by the courts of our state.

The economic times are unsettled. In response, the State of New York has enacted or amended various and important homeowner protection statutes, including but not necessarily limited to RPAPL sections 1303 and 1304, RPL section 265-a, Banking Law sections 6-l and 6-m, and CPLR section 3408. Our trial and appellate courts have been called upon to interpret the extent and meaning of most of these new statutory provisions, as should be expected whenever a new family of legislative enactments is added to the state's procedural and substantive legal requirements. Recent appellate pronouncements represent the settling of law on many interesting and colorable issues of first impression. Since there is necessarily a "lag time" between disputes between parties and their litigations in trial courts, and between dispositions in trial courts and their review on appeal, it is likely that the appellate divisions throughout the state will continue to receive, in the immediate months and years ahead, further appeals raising issues of first impression that relate in some way to the Home Equity Theft Protection Act and its constituent statutes.

The appellate divisions of our state, particularly in the second department where the volume of residential mortgage foreclosure actions is greatest, have found that our statutory interpretations focused, thus far, upon the following issues:

1) *Plaintiff's standing*, particularly in the realm of the foreclosing party's ability to document timely assignments of mortgages and notes, or the timely receipt of physical possession of the mortgages and notes. Standing issues relating to defendants have been focusing upon their timely assertion of the affirmative defense in their answers.

2) *The procedural requirements of RPL 265-a*, including the mutual obligations imposed by the statute upon the parties, and its application to dispositive motions.

3) *The procedural requirements of RPAPL 1303*, and whether they are conditions precedent to a plaintiff's foreclosure recoveries. The short answer is that strict compliance with the statute is required.

4) *The procedural requirements of RPAPL 1304*, and whether they are conditions precedent to a plaintiff's foreclosure recovery. The short answer is that strict compliance with the statute is required. Compliance need not be affirmatively pleaded in the plaintiff's answer, but if compliance is raised by the homeowner as a defense, the plaintiff must establish full compliance with RPAPL 1304 to be

eligible for foreclosure-related remedies.

5) *The procedural requirements of CPLR section 3408.* Cases at the trial and appellate levels have focused primarily upon whether particular homeowner defendants fall within the scope of the statute, and the remedies that may be available to parties and the conferencing court if the mandatory settlement negotiations are not conducted in good faith by a party.

Many of the groundbreaking legal pronouncements in these subject areas since the crash of the residential housing market in 2008 have been in the form of full opinions written by justices of the appellate court. It speaks highly to the dedication of the courts' judges and support staff that this evolving area of statutory and decisional law is receiving the conscientious attention that it deserves, to the benefit of lawyers and litigants alike.