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

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

Hon. Mark C. Dillon\*

## Introduction

There was only one mortgage foreclosure action filed in Putnam County, New York, in 2005.<sup>1</sup> Three years later, in 2008, there were fifty-three mortgage foreclosure actions filed in the same county,<sup>2</sup> representing a 5,200% increase in foreclosures in three years. In Orange County, New York, eight mortgage foreclosure actions were filed in 2005.<sup>3</sup> In 2008, the number of new mortgage foreclosure actions rose to an even 1,200,<sup>4</sup> representing a 14,200% increase in such filings. In Westchester County during the same time frame, the number of foreclosures rose from 565 to 1,676,<sup>5</sup> which is not as stunning as the increases that occurred in Putnam and Orange Counties, but still more than a threefold increase. The crisis in subprime lending that developed in 2007, 2008, and 2009 prompted a

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1. Statistics provided by the New York State Unified Court System, Foreclosure Cases Filed, by county (2005-2008).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

significant increase in foreclosures in many counties in the State of New York. Nationally, 860,000 homes were sold in foreclosure in 2008.<sup>6</sup> In the third quarter of 2009 alone, foreclosures reached a record national high of 937,840 homes that received a default notice, an auction notice, or that were repossessed by a bank.<sup>7</sup>

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

This Article examines the newly-enacted CPLR 3408 as it pertains to foreclosure actions filed in the State of New York. As will be shown below, CPLR 3408 fulfills a worthwhile purpose of requiring early settlement conferences with the trial courts, in the hope of preserving family home ownership, particularly for minorities and the poor, who are, statistically, most affected by the crisis in subprime mortgages.<sup>10</sup> As will also be shown below, however, the language of the legislation presents minor procedural flaws that can be rectified by judges

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6. *Foreclosures More than Doubled in 2008*, MSNBC, Jan. 15, 2009, <http://www.msnbc.msn.com/id/28663624/>.

7. Les Christie, *Foreclosures: Worst Three Months of All Time*, CNN, Oct. 15, 2009, [http://money.cnn.com/2009/10/15/real\\_estate/foreclosure\\_crisis\\_deepens/?postversion=2009101507](http://money.cnn.com/2009/10/15/real_estate/foreclosure_crisis_deepens/?postversion=2009101507). Care must be taken when examining foreclosure statistics, as some reported statistics focus upon only the number of homes actually sold at foreclosure auctions, whereas others—including those at issue here—include homeowners who merely receive default notices and auction notices, which precede foreclosure sales.

8. 2008 N.Y. Laws ch. 472. *See also* LaSalle Bank Nat'l Ass'n v. Novetti, 889 N.Y.S.2d 506, No. 6535-08, 2009 WL 1810511, at \*2 (Sup. Ct. June 15, 2009) (unreported disposition); Wells Fargo Bank, NA v. Edsall, 880 N.Y.S.2d 877, No. 3523-07, 2009 WL 175029, at \*3 (Sup. Ct. Jan. 22, 2009) (unreported disposition).

9. 2008 N.Y. Laws ch. 472. *See also* Wells Fargo Bank, NA, 2009 WL 175029, at \*3.

10. *See* Michael Powell & Janet Roberts, *Minorities Hit Hardest as New York Foreclosures Rise*, N.Y. TIMES, May 16, 2009, at A1. *See also* Manny Fernandez, *In Confronting the Foreclosure Crisis, A Bill Strikes a Balance*, N.Y. TIMES, June 22, 2008, at A25.

who are sensitive to the overriding purpose and intent of the statute. This Article is written with the hope and expectation that its subject matter is legally, economically, and socially timely.

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

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

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

(a) In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and

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11. While there is no statutory predecessor to CPLR 3408, the New York State Judiciary was ahead of the Legislature in recognizing the potential value of early settlement conferences in residential foreclosure actions. A report entitled RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTING EARLY COURT INTERVENTION was issued in June 2008 by then-Chief Judge Judith Kaye and by Chief Administrative Judge Ann Pfau. The report recognized the significant spike in residential foreclosure actions filed in the State of New York and the effect of foreclosures upon families, neighborhoods, banks, and the economy. It summarized the creation of a pilot Early Foreclosure Conference Part in Queens County where, under local rules, homeowner defendants could request, pursuant to written notice served with the summons and complaint, a court conference. The conference was to be held within sixty days from the filing of a Request for Judicial Intervention, which was to be purchased at the time proof of service was filed with the clerk of the court. The purpose of the conference was to streamline foreclosure litigations for lenders and to encourage settlements between the parties. N.Y. STATE UNIFIED COURT SYS., RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTING EARLY COURT INTERVENTION, at 2-4 [hereinafter N.Y. STATE UNIFIED COURT SYS. Report], *available at* <http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf>. The enactment of CPLR 3408 two months later, however, caused the pilot program to be subsumed by the procedures required by the state statute.

12. 2008 N.Y. Laws ch. 472, § 3; *Wells Fargo Bank, NA*, 2009 WL 175029, at \*4.

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

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

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

It is striking that within the original single paragraph of CPLR 3408(a), the terms “settlement,” “resolution,” and “agreed to” appear a total of five times. The terms underscore the purpose and legislative intent of the statute. CPLR 3408 was enacted to foster the early settlement of foreclosure actions as a means of preserving home ownership and to mitigate the subprime credit crisis, through the mandated auspices of the courts.<sup>13</sup> The law requires that a conference be conducted in

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13. See Sponsor’s Mem., Bill Jacket, L.2008, ch. 472, available at <http://image.iarchives.nysed.gov/images/images/142344.pdf>. See also *LaSalle*

foreclosure actions between the parties and the court, for the purpose of, *inter alia*, determining whether the parties can resolve the litigation and keep families in their homes by adjusting payment schedules or the amounts due.<sup>14</sup> Previously, there had been no such settlement conference requirement in New York. Professor David Siegel notes that since the state is unable to alter, *ex post facto*, the laws that were in effect when mortgage transactions were undertaken, a settlement conference between the parties under the auspices of the court may be the next best alternative to minimize the number of home foreclosures.<sup>15</sup>

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

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*Bank Nat'l Ass'n*, 2009 WL 1810511, at \*2; David D. Siegel, *Legislature Mandates Settlement Conference in Residential Foreclosure Actions in Effort to Ease Subprime Mortgage Crisis*, SIEGEL'S PRAC. REV., Sept. 2008, at 3, available at 201 SIEGELPR 3 (WestLaw); Abby Tolchinsky & Ellie Wertheim, *Bringing Borrowers and Lenders Together Under Foreclosure Law*, N.Y. L.J., May 8, 2009, at 3.

14. N.Y. C.P.L.R. 3408(a) (McKinney 2009). See also Siegel, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3408.

15. Siegel, *supra* note 13.

16. MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 7-8 (2009), available at [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkv.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkv.pdf).

17. *Id.* at 7-8 (citing Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures* 17 (N.Y.U. Center for Law & Econ., Law & Econ. Research Paper Series, Working Paper No. 08-41, Sept. 18, 2008)). The paper correlates the proximity of foreclosures to reductions in home sales prices in the same areas.

18. *Id.* at 8 (citing generally WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (May 11, 2005)).

19. *Id.* (citing Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851, 862 (2006)).

lose money from the foreclosures.<sup>20</sup>

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

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

The three mortgages identified in CPLR 3408 have different meanings. A "subprime" loan is defined as a home loan consummated between January 1, 2003 and September 1, 2008 secured by a mortgage or deed of trust on real estate upon which there is located, or is to be located, one or more structures intended to be used principally for occupation by one to four families, including the borrower, and for which the terms of the loan exceed a "threshold" defined in RPAPL

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20. *Id.* (citing PEW CHARITABLE TRUSTS, *DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS* 2, 11 (2008); Homeownership Preservation Foundation, *About Foreclosure, Common Myths*, <http://www.995hope.org/about-foreclosure/common-myths/> (last visited Feb. 14, 2010)).

21. *See* N.Y. C.P.L.R. 3408(a) (McKinney 2009).

22. *Id.*

23. *Id.*

24. *Id.*; N.Y. BANKING LAW § 6-*l*(1)(d).

25. *See* *Emigrant Mortgage Co., Inc. v. Turk*, 895 N.Y.S.2d 722 (App. Div. 2010); *Trustco Bank v. Alexander*, 886 N.Y.S.2d 69, No. 2008-3351, 2009 WL 1425247, at \*1 (Sup. Ct. May 12, 2009) (unreported disposition).

1304(5)(d).<sup>26</sup> For first lien mortgage loans, the threshold is exceeded when the annual percentage rate of the home loan, at the time of consummation, is three or more percentage points over the yield on treasury securities with comparable periods of maturity, measured as of the fifteenth day of the month in which the loan was consummated.<sup>27</sup> For subordinate mortgage liens, the threshold is five or more percentage points over the treasury security yields.<sup>28</sup> Subprime home loans do not include transactions to finance the initial construction of a dwelling, temporary or “bridge” loans with a term of twelve months or less, or home equity lines of credit.<sup>29</sup> If any home loan offers percentage terms that are lower during an initial or introductory period, with a higher rate after the end of such period, the threshold is determined by using the rate that becomes applicable after the initial or introductory period.<sup>30</sup>

A “nontraditional home loan” is defined as a payment option adjustable rate mortgage, or an interest only mortgage, consummated between January 1, 2003 and September 1, 2008.<sup>31</sup>

A “high-cost home loan” is defined in Banking Law 6-*l*. Its definition is more complicated than the definitions of subprime and nontraditional home loans. A high-cost home loan is a separately-defined “home loan”<sup>32</sup> that presents the additional component of being “high-cost.” A “home loan” is defined in Banking Law 6-*l*(1)(e) as a debt incurred by a natural person for personal, family, or household purposes, secured by a mortgage or deed of trust upon New York State real estate that is used as a principal dwelling for one to four families.<sup>33</sup> A “home loan” must also reflect a principal amount that does not exceed the conforming size limit for a comparable dwelling, established periodically by the federal national mortgage association.<sup>34</sup> Home loans do not include “reverse mortgage”

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26. N.Y. REAL PROP. ACTS. LAW § 1304(5)(c).

27. *Id.* § 1304(5)(d).

28. *Id.* See also *Accredited Home Lenders, Inc. v. Hughes*, 866 N.Y.S.2d 860, 862-63 (Sup. Ct. 2008).

29. N.Y. REAL PROP. ACTS. LAW § 1304(5)(c).

30. *Id.* § 1304(5)(d).

31. *Id.* § 1304(5)(e); *Accredited Home Lenders, Inc.*, 866 N.Y.S.2d at 862.

32. N.Y. BANKING LAW § 6-*l*(1)(e).

33. *Id.* § 6-*l*(1)(e)(ii)-(v).

34. *Id.* § 6-*l*(1)(e)(i).



transactions.<sup>35</sup> A home loan becomes “high-cost” when the terms of the loan exceed a threshold defined by Banking Law 6-*l*(1)(g).<sup>36</sup> This threshold is met for first lien mortgage loans when the annual percentage rate of the home loan at the time of consummation exceeds “eight percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender.”<sup>37</sup> For subordinate mortgage liens, the threshold is nine percentage points above the treasury security yields.<sup>38</sup> As with subprime loans, if any home loan offers percentage terms that are lower during an initial or introductory period, with a higher rate after the end of such period, the threshold is determined by using the rate applicable after the initial or introductory period.<sup>39</sup> As an alternative to the threshold, a home loan will become “high-cost” if total points and fees exceed 5% of the total amount of the loan for loans of \$50,000 or more; or 6% of the total loan amount of \$50,000 or more and the loan is a purchase money loan guaranteed by either the Federal Housing Administration or the Veterans Administration; or the greater of 6% or \$1,500, if the total loan amount is less than \$50,000.<sup>40</sup>

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35. *Id.* § 6-*l*(1)(e).

36. *Id.* § 6-*l*(1)(d). *See generally* LaSalle Bank, N.A. II v. Shearon, 881 N.Y.S.2d 599, 604-06 (Sup. Ct. 2009).

37. N.Y. BANKING LAW § 6-*l*(1)(g)(i).

38. *Id.*

39. *Id.*

40. *Id.* § 6-*l*(1)(g)(ii). The statute provides for a deduction of up to two bona fide loan discount points payable by the borrower, if the interest rate from which the loan interest rate is discounted does not exceed by more than one percentage point the yield on U.S. treasury securities having comparable maturity measured from the fifteenth day of the month immediately preceding the month in which the application was received, *id.* § 6-*l*(1)(g)(ii)(1), and all bona fide loan discount points funded directly or indirectly through grants from federal, state, or local agencies or tax exempt organizations, *id.* § 6-*l*(1)(g)(ii)(2). Certain high-cost home loan practices are expressly prohibited by the BANKING LAW, including acceleration provisions absent default by the borrower, *id.* § 6-*l*(2)(a), balloon payments that are more than twice as large as the average of earlier scheduled payments, *id.* § 6-*l*(2)(b), negative amortization by which regular periodic payments cause an increase in the principal balance, *id.* § 6-*l*(2)(c), interest rate increases as a result of the borrower’s default, *id.* § 6-*l*(2)(d), the application of more than two periodic payments paid in advance from the borrower’s loan proceeds, *id.*

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

No cases have yet been reported where parties have conclusively litigated whether the mortgage at issue was within, or without, the scope of CPLR 3408. One case that came close was *Accredited Home Lenders, Inc. v. Hughes*, in which the plaintiff and the defendant differed on the question of how the mortgage between them should be classified for purposes of CPLR 3408.<sup>43</sup> The defendant argued that the mortgage was a nontraditional home mortgage, whereas the

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§ 6-*l*(2)(e), fees for certain loan modifications, renewals, extensions or amendments, *id.* § 6-*l*(2)(f), oppressive mandatory arbitration clauses, *id.* § 6-*l*(2)(g), the financing of insurance or other defined products, *id.* § 6-*l*(2)(h), loan “flipping,” *id.* § 6-*l*(2)(i), the refinancing of special mortgages, *id.* § 6-*l*(2)(j), lending without verification of the borrower's ability to repay, *id.* § 6-*l*(2)(k), lending without counseling disclosure, *id.* § 6-*l*(2)(*l*), the financing of points and fees, *id.* § 6-*l*(2)(m), the payment of home improvement contractors from loan proceeds, *id.* § 6-*l*(2)(n), the encouragement of the borrower's default, *id.* § 6-*l*(2)(o), payments to mortgage brokers other than for goods and facilities actually furnished or services actually performed, *id.* § 6-*l*(2)(p), points and fees for refinancing a high-cost home loan to a new high-cost home loan, *id.* § 6-*l*(2)(q), prepayment penalties, *id.* § 6-*l*(2)(r), abusive yield spread premiums, *id.* § 6-*l*(2)(s), the non-collection by the lender of tax and insurance escrow for loans to be consummated after July 1, 2010, *id.* § 6-*l*(2)(t), the non-disclosure by the lender of taxes and insurance, *id.* § 6-*l*(2)(u), and “teaser rates” having a duration of less than six months, *id.* § 6-*l*(2)(v). The statute provides for penalties in the form of consequential and incidental damages, civil penalties, and attorneys fees, as well as equitable and injunctive relief, in the event that violations by lenders are proven by a preponderance of the evidence. *Id.* §§ 6-*l*(7) – (11). See generally *LaSalle Bank, N.A. v. Shearon*, 850 N.Y.S.2d 871 (Sup. Ct. 2008).

41. See Governor's Program Bill Mem., Summary of Provisions, Bill Jacket, L.2008, ch. 472.

42. See Siegel, *supra* note 13; Governor's Program Bill Mem., Summary of Provisions, Bill Jacket, L.2008, ch. 472; Press Release, Governor David A. Paterson, Governor Paterson Signs Comprehensive Reforms to Address Foreclosure Crisis (Aug. 5, 2008), available at [http://www.ny.gov/governor/press/press\\_0805081.html](http://www.ny.gov/governor/press/press_0805081.html).

43. *Accredited Home Lenders, Inc. v. Hughes*, 866 N.Y.S.2d 860, 862-63 (Sup. Ct. 2008).

plaintiff contended that the mortgage could instead qualify as a subprime home loan.<sup>44</sup> The Supreme Court, Essex County, did not need to reach this issue, as both types of mortgages qualified under CPLR 3408, and as the dispositive issue between the parties was whether the defendant resided in the subject property as to trigger the settlement conference requirement of the statute.<sup>45</sup>

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

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

The statute's remedies have been held to be unavailable to defendants who are actually engaged in duplicitous mortgage schemes.<sup>48</sup>

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

A third noteworthy aspect of CPLR 3408 is its residency requirement. CPLR 3408 specifically applies to actions where "the defendant is a *resident* of the property subject to foreclosure."<sup>49</sup> On the face of the statute, a borrower who is not

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44. *Id.*

45. *Id.* at 863.

46. 891 N.Y.S.2d 238 (Sup. Ct. 2009).

47. *Id.* at 243.

48. *See, e.g.,* Wells Fargo Bank, NA v. Edsall, 880 N.Y.S.2d 877, No. 3523-07, 2009 WL 175029, at \*4 (Sup. Ct. Jan. 22, 2009) (unreported disposition).

49. N.Y. C.P.L.R. 3408(a) (McKinney 2009) (emphasis added); U.S. Bank, N.A. v. Flynn, No. 2010-20093, 2010 WL 936224, at \*4 (Sup. Ct. Mar. 12, 2010).

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

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

According to one court, the language of CPLR 3408 does

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50. 880 N.Y.S.2d 224, No. 226806, 2009 WL 211787 (Sup. Ct. Jan. 23, 2009) (unreported disposition).

51. *Id.* at \*1-2.

52. *Id.* at \*2.

53. *Id.*

54. *See, e.g.*, *Antone v. Gen. Motors Corp.*, 64 N.Y.2d 20, 28 (1984).

not expressly address whether a foreclosure defendant must reside at the property when the mortgage contract is executed, or, rather, when the foreclosure action is commenced.<sup>55</sup> This difference is potentially significant. In *Accredited Home Lenders, Inc. v. Hughes*, the defendants entered into a subprime home loan for property in Essex County, New York and defaulted on their payment obligations.<sup>56</sup> The defendants were residing in New Jersey, either permanently or temporarily, when the foreclosure action was later commenced.<sup>57</sup> The plaintiff argued that CPLR 3408 was inapplicable, as the defendants' residency in New Jersey meant that they were not residents of the New York property that was subject to foreclosure.<sup>58</sup> The Supreme Court disagreed, focusing on the language of RPAPL 1304 that is incorporated into CPLR 3408, which defines subprime and nontraditional home loans.<sup>59</sup> The court noted that under RPAPL 1304, a default notice must be transmitted to the borrower by registered or certified mail and by regular mail at least ninety days prior to the commencement of any foreclosure action, and that such notice must be sent to the address of the mortgaged premises *or* to the borrower's last known address, if different.<sup>60</sup> The court, therefore, viewed RPAPL 1304 as acknowledging that borrowers of subprime and nontraditional home loans might not live at the mortgaged property at the time foreclosure actions are commenced, which is ambiguous when juxtaposed against the language of CPLR 3408 that requires, in present-tense language, that borrowers reside at the mortgaged property.<sup>61</sup> Finding the statute ambiguous, the court stated that the legislative intent of CPLR 3408 was to expansively benefit borrowers subject to subprime and nontraditional home loans, other than owners of second homes

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55. *Accredited Home Lenders, Inc. v. Hughes*, 866 N.Y.S.2d 860, 863 (Sup. Ct. 2008).

56. *Id.* at 862.

57. *Id.*

58. *Id.*

59. *Id.* at 863.

60. *Id.* See also N.Y. REAL PROP. ACTS. LAW § 1304(1), (2) (McKinney 2009).

61. Compare N.Y. REAL PROP. ACTS. LAW § 1304(2) with N.Y. C.P.L.R. 3408(a).

or investment properties.<sup>62</sup> The court held that CPLR 3408 was not intended to require borrowers to remain at their mortgaged premises while foreclosure actions were being prepared or were pending.<sup>63</sup> The court, therefore, concluded that even if the defendants had relocated their residence to New Jersey, they were entitled to the mandatory settlement conference conferred by CPLR 3408.<sup>64</sup>

The reasoning used by the court in *Accredited Home Lenders* is arguably incorrect. Courts must interpret the meaning of statutes by looking at the plain language used by the legislature, as it is the clearest indicator of statutory intent.<sup>65</sup> Only when a statute is ambiguous will courts examine the legislative history underlying the statute for evidence of the legislature's intent.<sup>66</sup> Here, the language of CPLR 3408(a) speaks purely in the present tense; the statute applies to a defendant who "is a resident of the property subject to foreclosure."<sup>67</sup> The terms "is" and "subject to foreclosure" necessarily pertain to the present tense, when a property is in default and when a foreclosure action is pending. Reference by the court in *Accredited Home Lenders* to the residence language of RPAPL 1304 is misplaced, as RPAPL 1304 is only incorporated by reference into CPLR 3408 for the limited purpose of defining the meaning of "subprime" and "nontraditional" home loans.<sup>68</sup> The language of CPLR 3408 that entitles the borrower to a settlement conference, where "the defendant *is a resident of the property subject to*

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62. *Accredited Home Lenders Inc.*, 866 N.Y.S.2d at 863.

63. *Id.*

64. *Id.*

65. See, e.g., *Jones v. Bill*, 890 N.E.2d 884 (N.Y. 2008); *Bluebird Partners L.P. v. First Fid. Bank*, 767 N.E.2d 672, 674 (N.Y. 2002); *Yong-Myun Rho v. Ambach*, 546 N.E.2d 188, 190 (N.Y. 1989); *Sutka v. Connors*, 538 N.E.2d 1012, 1015 (N.Y. 1989); *Janssen v. Inc. Vill. of Rockville Ctr.*, 869 N.Y.S.2d 572, 581-82 (App. Div. 2008); *Ragucci v. Prof'l Constr. Servs.*, 803 N.Y.S.2d 139, 142 (App. Div. 2005) (quoting *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 696 N.E.2d 978, 980 (N.Y. 1998)).

66. See, e.g., N.Y. STAT. LAW §§ 76, 94; *Action Elec. Contractors, Inc. v. Goldin*, 474 N.E.2d 601, 604 (N.Y. 1984). See also *Ferres v. City of New Rochelle*, 502 N.E.2d 972, 975 (N.Y. 1986); *Uniformed Firefighters Ass'n, Local 94 v. Beekman*, 420 N.E.2d 938, 941 (N.Y. 1981); *Tutunjian v. Conroy*, 865 N.Y.S.2d 768, 770 (App. Div. 2008); *Kearns v. Piatt*, 716 N.Y.S.2d 418, 419 (App. Div. 2000).

67. N.Y. C.P.L.R. 3408(a) (emphasis added).

68. *Id.*

*foreclosure*,<sup>69</sup> is explicit and unambiguous. The present-tense language of the residency requirement of CPLR 3408(a) trumps any seemingly inconsistent language in RPAPL 1304, as only CPLR 3408 defines the circumstances under which the defendant is entitled to the statute's mandated settlement conference. Consequently, an argument can be made that, contrary to the conclusion reached in *Accredited Home Lenders*, the better construction of CPLR 3408 is to apply its residency requirement to defendants as of the time the action is commenced to foreclose upon the property, remove the borrower occupants, and pass title through a court-appointed referee.

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

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69. *Id.* (emphasis added).

70. On occasion, plaintiffs in foreclosure actions file and serve motions for summary judgment in lieu of a complaint under CPLR 3213. *See, e.g.*, *Dyck-O'Neal, Inc. v. Thomson*, 868 N.Y.S.2d 838 (App. Div. 2008); *Lakeville Manor, Inc. v. KBK Enters., LLC*, 772 N.Y.S.2d 591 (App. Div. 2003); *Gregorio v. Gregorio*, 651 N.Y.S.2d 599 (App. Div. 1996); *F.D.I.C. v. De Cresenzo*, 616 N.Y.S.2d 638 (App. Div. 1994); *Norton Co. v. C-TC 9th Ave. P'ship*, 603 N.Y.S.2d 364 (App. Div. 1993); *Joswick v. Rossi*, 593 N.Y.S.2d 257 (App. Div. 1993); *Stern v. Chemical Bank*, 372 N.Y.S.2d 913, 916 (Civ. Ct. 1975). Such motions may only be filed when the action is based upon an instrument for the payment of money—like a note—and cannot be used for equitable relief such as the court-ordered sale of the property and the eviction of the defendant. In foreclosure actions where the defendant is not subject to sale and eviction, the defendant would ordinarily not be a resident of the

#### D. *Internal Chronological Limitations*

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

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

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property. Accordingly, it would appear that in actions where plaintiffs seek summary judgment in lieu of a complaint under CPLR 3213, the absence of the defendant’s residence in the property would render the settlement conference of CPLR 3408 inapplicable.

71. 2008 N.Y. Laws ch. 472, § 3.

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

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

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

75. *Id.* 3408.

76. *Id.*



E. *The Statute's Non-Retroactivity*

Statutes in New York are generally presumed to have prospective application, unless their language expressly or impliedly requires a retroactive construction.<sup>77</sup> CPLR 3408 contains no language indicating that it may be applied to actions pending prior to its effective date.<sup>78</sup>

One case confirms the absence of retroactivity, *LaSalle Bank National Ass'n v. Novetti*.<sup>79</sup> *LaSalle Bank* involved a foreclosure action commenced on February 13, 2008, prior to the effective date of CPLR 3408.<sup>80</sup> The defendant initially defaulted in appearing and answering the plaintiff's complaint.<sup>81</sup> An order of reference was rendered on September 16, 2008, after the effective date of CPLR 3408, and was followed by a judgment of foreclosure and sale executed by the court on January 26, 2009.<sup>82</sup> Thereafter, on February 5, 2009, counsel for the defendant, who had belatedly appeared in the action, demanded a settlement conference and moved to stay the foreclosure sale pending the conduct of the conference.<sup>83</sup> The Supreme Court, Suffolk County, denied the defendant the settlement conference contemplated by CPLR 3408 on the ground that the foreclosure action had been commenced prior to the effective date of the statute.<sup>84</sup> The court's ruling appears to be correct. If CPLR 3408 is viewed as a remedial statute,

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

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

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

80. *Id.*

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

82. *Id.* at \*2.

83. *Id.*

84. *Id.*

intended to stem the rash of home foreclosures within the state by providing defendant homeowners with a new right to a settlement conference, then the statute—as with all statutes that create new rights—is to be applied prospectively.<sup>85</sup> If CPLR 3408 is instead viewed as merely procedural in nature, then it is to be applied in pending actions only as to procedural steps to be undertaken after the statute’s enactment.<sup>86</sup> In *LaSalle Bank*, the 60-day settlement conference period had presumably already passed by the time CPLR 3408 became effective.

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

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

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

87. 2008 N.Y. Laws ch. 472, § 3-a.

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

89. 2008 N.Y. Laws ch. 472, § 3-a.

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

### F. *Telephonic and Video-Conferencing*

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

The statute’s provision that a “representative of the plaintiff” may be permitted to electronically participate in the conference does not appear to refer to the plaintiff’s attorney. CPLR 3408 refers frequently to “the plaintiff,” “the defendant,” “parties,” and “counsel.” The term “representative of the

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

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

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

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

plaintiff” appears only one time in the statute, when referring to the electronic participation option. The Legislature’s use of the term “representative” rather than “counsel” suggests that the individual who may participate in the conference electronically is someone other than the plaintiff’s attorney; otherwise, the Legislature could have simply referred to the individual as the plaintiff’s counsel, as it did elsewhere. The Bill Jacket for CPLR 3408 sheds no particular light on the identity of this “representative.” However, the term likely refers to a representative of the bank or mortgage company, such as a corporate officer, litigation manager, or accountant involved in settlement-related decision-making or the computation of proposed compromised payment schedules.

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

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

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

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

96. 2009 N.Y. Sess. Laws ch. 507, § 9 (McKinney); Press Release, Governor David A. Paterson, Governor Paterson Signs Comprehensive

The amendment of CPLR 3408 adds, *inter alia*, subdivisions (d) through (h) to the statute.<sup>97</sup> The amended statute keeps intact all aspects of the original version of the statute, except for the application of its terms in subdivision (a) to all “home loans.”<sup>98</sup> The meaning of “home loans” is set forth in RPAPL 1304, and includes all loans for one- to four-family dwellings secured by a mortgage or deed of trust. The amended statute therefore abolishes the need for qualifying residential mortgage foreclosure defendants to be parties to subprime, non-traditional or high-cost loans. Inferentially, the expanded statute recognizes a current economic reality that the foreclosure problem in New York extends beyond subprime, non-traditional and high-cost residential mortgages, to conventional residential mortgages as well.

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

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

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Foreclosure Legislation into Law (Dec. 15, 2009), *available at* [http://www.state.ny.us/governor/press/press\\_12150901.html](http://www.state.ny.us/governor/press/press_12150901.html).

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

98. *Id.* § 9(a).

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

100. *Id.*

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

time.

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

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

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

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102. *Id.* § 9(f).

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

104. *Id.* at 319.

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

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

107. *Id.* § 9(h).

## III. Perceived Pitfalls of CPLR 3408

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

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

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

More specifically, CPLR 308(2) permits service of process to be accomplished at a defendant's "actual place of business, dwelling place, or usual place of abode" by delivery of the summons to a person of suitable age and discretion, followed within twenty days by either a mailing to the defendant at his or her last known residence, or a first-class mailing to the defendant at his or her actual place of business in an unmarked envelope marked "personal and confidential."<sup>109</sup>

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

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

When the “suitable age and discretion” method is used, the plaintiff is required to file proof of service with the clerk of the court within twenty days from the latter of such delivery or mailing, and service is deemed to be complete ten days after the filing.<sup>110</sup>

Likewise, if service cannot be accomplished with due diligence by either personal service or upon a person of suitable age and discretion, the plaintiff may utilize the colloquially-known “nail and mail” method set forth in CPLR 308(4), which also has a proof of service requirement.<sup>111</sup> This method requires that the summons be affixed to the door of the defendant’s actual place of business, dwelling place, or usual place of abode, followed by a mailing to the defendant at his or her last known residence, or by a first-class mailing to the defendant’s actual place of business in an unmarked envelope marked “personal and confidential.”<sup>112</sup> Like service under CPLR 308(2), the “nail and mail” method requires the filing of proof of service with the clerk of the court within twenty days of either the affixing or mailing, whichever is later, and service is deemed complete ten days after such filing.<sup>113</sup>

However, many actions are commenced in New York by

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110. N.Y. C.P.L.R. 308(2). *See generally* Weininger v. Sassower, 612 N.Y.S.2d 249 (App. Div. 1994); Bartlett v. Gage, 633 N.Y.S.2d 246, 248 (Sup. Ct. 1995). The failure of a party to file a timely proof of claim is not a jurisdictional defect, but is instead a mere irregularity that is curable by motion to the court. *See* N.Y. C.P.L.R. 2004; Zareef v. Lin Wong, 877 N.Y.S.2d 182 (App. Div. 2009); County of Nassau v. Gallagher, 828 N.Y.S.2d 445 (App. Div. 2006); Penachio v. Penachio, 812 N.Y.S.2d 592, 594 (App. Div. 2006); Koslowski v. Koslowski, 672 N.Y.S.2d 808 (App. Div. 1998); Hausknecht v. Ackerman, 662 N.Y.S.2d 567, 569-70 (App. Div. 1997); Bank of N.Y. v. Schwab, 467 N.Y.S.2d 415 (App. Div. 1983); Marazita v. Nelbach, 456 N.Y.S.2d 423 (App. Div. 1982).

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

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

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



means of personal service upon individual defendants as authorized by CPLR 308(1)<sup>114</sup> and by service upon a properly-designated agent as authorized by CPLR 308(3).<sup>115</sup> Neither of these methods require, in CPLR 308 or elsewhere, that the plaintiff file any proof of service with the court.<sup>116</sup>

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

This flawed draftsmanship could have been avoided. In matrimonial actions, Uniform Rule 202.16(f) provides for an analogous requirement that a preliminary conference be held between the parties and the court “within 45 days after the action has been assigned.”<sup>117</sup> The assignment of an action to a judge, by means of a Request for Judicial Intervention (“RJI”), must occur in matrimonial actions within forty-five days from

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114. N.Y. C.P.L.R. 308(1). *See generally* *Espy v. Giorlando*, 436 N.E.2d 193 (N.Y. 1982); *McGreevy v. Simon*, 633 N.Y.S.2d 177, 178 (App. Div. 1995); *Coyne v. Besser*, 546 N.Y.S.2d 129 (App. Div. 1989); *Velez v. Smith*, 540 N.Y.S.2d 339 (App. Div. 1989); *Jones v. Nossoughi*, 537 N.Y.S.2d 565 (App. Div. 1989); *Profl Billing Res., Inc. v. Haddad*, 705 N.Y.S.2d 204, 207 (N.Y. City Civ. Ct. 2000); *Bertha G. v. Paul T.*, 509 N.Y.S.2d 995, 996-97 (Fam. Ct. 1986).

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

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

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

the date of service upon the defendant of the summons with notice or summons and complaint.<sup>118</sup> The mandatory preliminary conference for matrimonial actions under Uniform Rule 202.16(f), therefore, in effect, establishes an outside date within which preliminary conferences must be conducted by the court. The purpose of Uniform Rule 202.16(f) is to assure that matrimonial actions, which often raise difficult and important issues such as child custody, visitation, *pendente lite* child support and maintenance, and the ultimate equitable distribution of marital assets, receive reasonably prompt attention from the courts.<sup>119</sup> Prompt preliminary conferences ensure that parties have an opportunity, early in their litigations, to stipulate to non-contested issues and to obtain court-ordered discovery schedules that shepherd the progress of the litigations. The scheduling of preliminary conferences in matrimonial actions, triggered by the filing of a deadlined RJI, is implemented in courts throughout the state without apparent problems or difficulties. Similarly, in actions for medical, dental and podiatric malpractice, CPLR 3406(a) requires the filing of a notice with the court within sixty days from the joinder of issue.<sup>120</sup> The purpose of the notice is to trigger an early conference with the court to discuss settlement, simplify issues, and schedule discovery.<sup>121</sup> There is no reason that the New York Legislature, in enacting CPLR 3408, could not also have required that settlement conferences be scheduled within a certain time period after a fixed date applicable to all foreclosure actions, such as from the filing of the plaintiff's summons and complaint or the joinder of issue.

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

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

120. *See also* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.56(a)(1), (b); *Sturletti v. Stigliano*, 511 N.Y.S.2d 770, 770 (Sup. Ct. 1986).

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

Instead, by measuring the scheduling period from the filing of proof of service, which may not even occur in certain cases, CPLR 3408 introduces an element of statutory uncertainty and potential confusion that could have been easily avoided.

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

The one problem with Uniform Rule 202.12a, however, is that the specialized foreclosure RJI need not be filed by the plaintiff until the filing of the plaintiff's proof of service and, as noted, the filing of proof of service is not always required.<sup>127</sup> The reason that Uniform Rule 202.12a mitigates the problem is that plaintiffs cannot seek or obtain relief from the courts, such as by the filing of motions for summary judgment, except by first filing their RJIs. In the end, therefore, the Uniform Rule will accomplish its practical purpose of triggering the mandated settlement conference in all covered actions, either sooner or later in each covered action. Uniform Rule 202.12a is

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122. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12a (2008).

123. *Id.* § 202.12a(a).

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

125. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12a(b).

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

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

not as effective as its matrimonial counterpart, Uniform Rule 202.16(d), as the mortgage foreclosure rule places no fixed outside time limit on when the plaintiff's RJI must be filed in *all* cases, whereas the matrimonial rule requires the filing of an RJI within forty-five days from the service of the summons upon the defendant in every case.<sup>128</sup> In other words, Uniform Rule 202.16(d) will prove to be more effective in assuring the scheduling of prompt preliminary conferences for all matrimonial litigants than Uniform Rule 202.12a will be in assuring prompt settlement conferences for covered residential foreclosure litigants. The delay in scheduling and conducting settlement conferences in certain covered foreclosure actions will occur in circumstances when plaintiffs are under no statutory obligation to file proofs of service under CPLR 308(1) and 308(3), and where no RJIs are filed until such times that plaintiffs are motivated to seek some form of affirmative relief from the courts.

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

Judges can further the letter and spirit of CPLR 3408 by assuring that if the RJI is filed by plaintiffs in conjunction with motions for affirmative relief, such as for summary judgment, the motions should be held in abeyance pending the completion of the mandated settlement conference. Such a rule would be

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128. Compare N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12a(c) with N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(d).

consistent with the discretion that is afforded to trial judges to control their calendars.<sup>129</sup> Courts should not permit foreclosure plaintiffs to use summary judgment motions to circumvent the settlement conference procedures of CPLR 3408.

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

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

If proof of service need not be filed with the clerk of the court, and if a defendant defaults by failing to appear in the action or answer the plaintiff's complaint, the remedy that is routinely undertaken by foreclosure plaintiffs is to file a motion seeking judgment on default.<sup>132</sup> One of the elements that must be proven in support of default judgments is proof of service of process upon the defendant.<sup>133</sup> Indeed, CPLR 3215(f) requires that all motions for default judgments contain evidence<sup>134</sup> proving that service of process has, in fact, been effected upon the defendant.<sup>135</sup> An issue that arises from such default

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

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

131. *Id.* 3408(a).

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

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

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

135. N.Y. C.P.L.R. 3215(f). *See generally* *Mullins v. DiLorenzo*, 606 N.Y.S.2d 161 (App. Div. 1993); *Shapiro v. Rose*, 600 N.Y.S.2d 819 (App. Div. 1993); *Ice Sculpture Designs, Inc. v. Icebreakers*, 836 N.Y.S.2d 493, No.

motions, unique to foreclosure actions subject to CPLR 3408, is whether the inclusion of proof of service in the supporting papers constitutes a “filing of proof of service” with the clerk so as to trigger, under these circumstances, the mandatory settlement conference.

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

If, *arguendo*, evidence of proof of service attached to a default motion doubles as a “filing” of proof of service with the clerk of the court so as to mandate the scheduling of a settlement conference, then, necessarily, courts should hold such default motions in abeyance pending the scheduling of a conference at which the defendant may, or may not, appear. CPLR 3408 sets forth no minimum notice period; it only imposes a sixty-day maximum deadline measured from the filing of proof of service. Notice of a scheduled settlement conference while a default motion is held in abeyance, as with notice of all conferences generally, should be reasonable and transmitted by the court to an address calculated to advise the

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50194(U), 2007 WL340293, at \*2 (Sup. Ct. Feb. 5, 2007) (unreported disposition); Tucker Family Trust v. Taylor, 836 N.Y.S.2d 490, No. 50087(U), 2007 WL 137112 (Sup. Ct. Jan. 18, 2007) (unreported disposition); Einheber v. Bodenheimer, 820 N.Y.S.2d 842, No. 51264(U), 2006 WL 1835019, at \*3 (Sup. Ct. May, 5, 2006) (unreported disposition); Adkins v. Lipner, Gordon & Co., 814 N.Y.S.2d 559, No. 52073(U), 2005 WL 3487789, at \*3 (Sup. Ct. Dec. 20, 2005) (unreported disposition); Jann v. Cassidy, 696 N.Y.S.2d 337 (Sup. Ct. 1999); Matthew v. Mosier, 832 N.Y.S.2d 408 (City Ct. 2007).

defendant of the date, time, and place of the conference. Any delays occasioned by the conference procedure to the prompt disposition of pending default motions would be expected in most instances to be reasonable and minor and would be outweighed by the intended benefit to the parties of potentially settling foreclosure actions in a restructured manner that may keep families in their homes.

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

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

In New York, defendants who seek to vacate default judgments are generally required under CPLR 5015 to meet a two-pronged test, the first being a reasonable excuse for the default,<sup>136</sup> and the second being the existence of a meritorious claim or defense.<sup>137</sup>

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

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

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

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

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

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

In its proper context, CPLR 3408 is, for defendants, actually a second bite at the settlement apple. One of the provisions of the Subprime Residential Loan and Foreclosure Laws of 2008 is RPAPL 1304, which provides that, as a condition precedent to the commencement of a residential

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Executive Health Exam'rs, 716 N.Y.S.2d 3 (App. Div. 2000).



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

A perceived pitfall of CPLR 3408 is that, while the statute mandates a settlement conference in residential foreclosure actions, there is no mechanism, beyond the conference itself, assuring that any meaningful accomplishments will arise from the effort. As noted, by the time of the conference, earlier settlement opportunities have, by definition, already failed. It cannot be reasonably expected that all or even most of the conferences will lead to a resolution of foreclosure litigations. However, CPLR 3408 provides that any counsel appearing for the mandatory settlement conference “shall be fully authorized to dispose of the case,”<sup>141</sup> likely written to help assure the

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

139. N.Y. REAL PROP. ACTS. LAW § 1304(1). When foreclosure actions are commenced, further warnings and advice must be provided to the borrower with the summons and complaint, as set forth in RPAPL 1303. See *Countrywide Home Loans, Inc. v. Taylor*, 843 N.Y.S.2d 495, 498 (Sup. Ct. 2007) (regarding a predecessor version of CPLR 1303).

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

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

seriousness and desired productivity of the conferences. The recent amendments to CPLR 3408 include the statute's new subdivision (f) that requires parties to negotiate in good faith at the settlement conferences,<sup>142</sup> which may be of marginal practical solace. Without doubt, the required residential foreclosure settlement conferences add to the workload of an already-overburdened judiciary. Each judge throughout the state may handle the conferences differently: either in chambers or in open court, on motion days or in special session, personally or through a law secretary, with or without meaningful negotiation.<sup>143</sup> The value of the conference will depend in any given instance upon a variety of factors including the facts of the case, the goals and reasonableness of the parties, and the negotiating experience and quality of the assigned judge and counsel.

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

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

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

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

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

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

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

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

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

As a practical matter, settlements will not occur unless both parties are truly interested in reaching an arrangement that saves the borrower's home while meeting the legitimate financial interests of the lender. Settlements will also prove impossible when a borrower's financial circumstances have declined to where a proposed restructured payment schedule is not viable for the borrower. Typically, settlements will not be reached during the initial conference between the court and the

parties, as the borrower must often provide further information to assist the lender in calculating an offer that restructures mortgage payments. The parties must, therefore, appear at the court on two or three occasions before any settlement can be finalized. The need for multiple conferences means that the statistics for settlements will often lag behind the statistics of the conferences that are shown to have been scheduled. Statistics maintained by certain counties reveal that the rate of adjournments is 73% in Nassau County, 66.3% in Westchester County, and 60% in Queens County.<sup>147</sup> The settlement success rate should be expected to ultimately exceed the current reported statistics, as these statistics do not reflect the significant number of cases for which scheduled settlement conferences have been adjourned or for continuing conferences that have not yet run their course.

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

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

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

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

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

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

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

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

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

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

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York State Senate. *See generally* New York State Assembly, A06756 Summary, <http://assembly.state.ny.us/leg/?bn=A06756> (last visited Feb. 15, 2010).

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

154. *Id.* § 49-31l(c)(1).

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

156. *Id.* § 49-31n(b)(2).

157. *Id.* § 49-31n(c)(1).

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

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

160. *Id.*

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

the court to make available in the courtroom the necessary forms that must be filled out for the *pro se* applicant to potentially meet the requirements for the appointment of counsel.

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

When a defendant's application for assigned counsel is granted at the mandatory settlement conference, CPLR 3408(b) directs that the conference be continued on a later date for the appearance and participation of the assigned attorney.<sup>164</sup> The availability of a mechanism for the appointment of counsel to eligible defendants is significant. Defendants subject to foreclosure upon the subprime, high-cost, and nontraditional mortgages contemplated by CPLR 3408 are likely to disproportionately represent poor and minority households.<sup>165</sup>

However, while CPLR 3408(b) created a statutory right to assigned counsel in covered mortgage foreclosure actions, the statute did not provide any underlying *funding* of assigned counsel. The statutory amendments enacted in 2009 likewise contain no funding for assigned counsel, and in fact declared the amendments to be revenue-neutral.<sup>166</sup> Courts that find

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

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

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

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

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

defendants eligible for assigned counsel, therefore, refer defendants to legal service organizations, bar associations, and lists of available *pro se* attorneys, but there is no guarantee that such referrals will actually result in attorney-client representation. The Brennan Center for Justice at New York University School of Law found that in Queens County between November 2008 and May 2009, 84% of defendants in foreclosure actions involving subprime, high-cost, and nontraditional mortgages were without full legal representation.<sup>167</sup> The figures for Richmond and Nassau Counties were estimated by the OCA as 91% and 92%, respectively.<sup>168</sup> These figures are not fully representative of reality, as they do not include instances of legal representation for “incidental” or “additional” defendants, nor do they account for the many defendants who default by failing to answer plaintiffs’ complaints or who fail to attend the settlement conferences,<sup>169</sup> thereby skewing the percentages higher. The figures may also include *pro se* defendants who requested assigned counsel but were found to be ineligible for it.

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

The counsel provision in CPLR 3408 is important, considering that the vast majority of foreclosure plaintiffs are

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finances.”).

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

168. *Id.*

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

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

institutions that commence the litigations through counsel. One responsibility of all attorneys is to assure a good faith basis for the actions they commence.<sup>171</sup> Moreover, once foreclosure actions are commenced, the lenders' attorneys often fast-track the litigations with motions for summary judgment under CPLR 3212. Appellate cases are legion that lenders establish their *prima facie* entitlement to summary judgment merely by evidencing to the court the mortgage, the unpaid note, and the borrower's default.<sup>172</sup> Since it is not uncommon

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

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



for financial institutions to sell and assign mortgages and notes, a plaintiff that is an assignee must also tender evidence that it received the mortgage and note by a proper prior assignment.<sup>173</sup> The plaintiff's initial burden is not particularly difficult for institutional lenders to meet since it relies on readily-accessible documentation. Once the plaintiff's *prima facie* burden is met, the burden shifts to the borrower defendant to establish, through admissible evidence, the existence of a triable issue of fact as a defense to the action,<sup>174</sup>

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142 (App. Div. 2000); *Delta Funding Corp. v. Yaede*, 702 N.Y.S.2d 854 (App. Div. 2000); *Sinardi v. Rivera*, 689 N.Y.S.2d 236 (App. Div. 1999); *First Union Nat'l Bank v. Weston*, 689 N.Y.S.2d 543, 545 (App. Div. 1999); *Hoffman v. Kraus*, 688 N.Y.S.2d 575, 576 (App. Div. 1999); *Mahopac Nat'l Bank v. Baisley*, 664 N.Y.S.2d 345 (App. Div. 1997); *Bercy Investors, Inc. v. Sun*, 657 N.Y.S.2d 47 (App. Div. 1997); *Fed. Home Loan Mortgage Corp. v. Karastathis*, 655 N.Y.S.2d 631 (App. Div. 1997); *Chem. Bank v. Bowers*, 643 N.Y.S.2d 653 (App. Div. 1996); *DiNardo v. Patcam Serv. Station, Inc.*, 644 N.Y.S.2d 779 (App. Div. 1996); *N. Fork Bank v. Hamptons Mist Mgmt. Corp.*, 639 N.Y.S.2d 452 (App. Div. 1996); *Home Sav. Bank v. Schorr Bros. Dev. Corp.*, 624 N.Y.S.2d 53 (App. Div. 1995); *Governor & Co. of the Bank of Ireland v. Dromoland Castle Ltd.*, 624 N.Y.S.2d 855 (App. Div. 1995); *Zitel Corp. v. Fonar Corp.*, 619 N.Y.S.2d 964 (App. Div. 1994); *Vill. Bank v. Wild Oaks Holding, Inc.*, 601 N.Y.S.2d 940 (App. Div. 1993); *Silber v. Muschel*, 593 N.Y.S.2d 306 (App. Div. 1993); *Metro. Distrib. Servs. v. DiLascio*, 574 N.Y.S.2d 755 (App. Div. 1991); *Marton Asss. v. Vitale*, 568 N.Y.S.2d 119, 121 (App. Div. 1991); *Gateway State Bank v. Shangri-La Private Club for Women*, 493 N.Y.S.2d 226 (App. Div. 1985), *aff'd*, 67 N.Y.2d 627 (1986).

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

174. *See* *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 436 N.E.2d 1265 (N.Y. 1982); *State Bank of Albany v. Fioravanti*, 417 N.E.2d 60 (N.Y. 1980); *HSBC Bank USA v. Merrill*, 830 N.Y.S.2d 598, 599 (App. Div. 2007); *Wilmington Trust Co. v. Ajuda*, 730 N.Y.S.2d 871 (App. Div. 2000); *Rose*, 861 N.Y.S.2d at 374; *Alvarez*, 854 N.Y.S.2d at 171; *Leone*, 845 N.Y.S.2d at 513; *Neiva*, 842 N.Y.S.2d at 6; *Houston*, 843 N.Y.S.2d at 660; *Jackson*, 833 N.Y.S.2d at 542; *LaSalle Bank N.A. v. Kosarovich*, 820 N.Y.S.2d 144, 145 (App. Div. 2006); *Household Fin. Realty Corp. of N.Y. v. Winn*, 796 N.Y.S.2d 533 (App. Div. 2005); *Olasov*, 793 N.Y.S.2d at 52; *Butti*, 792 N.Y.S.2d at 505; *Marshall*, 757 N.Y.S. at 163; *Etheridge*, 751 N.Y.S.2d at 741-42; *EMC Mortgage Corp.*, 737 N.Y.S.2d at 114; *Fleet Bank*, 736 N.Y.S.2d at 739; *Schantz*, 731 N.Y.S.2d 808-09; *Paterson*, 727 N.Y.S.2d at 333; *Sansone*, 727 N.Y.S.2d at 517; *Hingos*, 724 N.Y.S.2d at 135; *Credit Based Asset Servicing &*

such as, but not limited to, waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff.<sup>175</sup> Counsel can be of crucial importance to defendants in navigating the summary judgment process.

The benefits of having counsel at foreclosure settlement conferences are also easy to imagine. Attorneys may advise defendants of potential legal defenses specifically related to, *inter alia*, the federal Truth in Lending Act (“TILA”),<sup>176</sup> the

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Securitization v. Castelli, 711 N.Y.S.2d 624, 625 (App. Div. 2000); *Simoni*, 708 N.Y.S.2d at 142; *Weston*, 689 N.Y.S.2d at 544; *Green Point Sav. Bank v. Spivey*, 676 N.Y.S.2d 228 (App. Div. 1998); *Trustco Bank, Nat'l Ass'n v. Labriola*, 667 N.Y.S.2d 450 (App. Div. 1998); *Baisley*, 664 N.Y.S.2d at 346; *Bercy Investors, Inc.*, 657 N.Y.S.2d at 47; *Karastathis*, 655 N.Y.S.2d at 630; *DiNardo*, 644 N.Y.S.2d at 779; *N. Fork Bank*, 639 N.Y.S.2d at 452; *Naugatuck Sav. Bank v. Gross*, 625 N.Y.S.2d 572 (App. Div. 1995); *Zitel*, 619 N.Y.S.2d at 964; *Vill. Bank*, 601 N.Y.S.2d at 940; *DiLascio*, 574 N.Y.S.2d at 755; *Vitale*, 568 N.Y.S.2d at 120.

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

176. Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601 to 1667f (2006)). TILA was enacted to “assure a meaningful disclosure of credit terms so that [consumers] will be able to compare more readily the various credit terms available to [them] and avoid the uninformed use of credit.” *Deutsche Bank Nat'l Trust v. West*, 22 Misc.3d 1132(A), No. 38830/07, 2009 WL 606661, at \*1 (N.Y. Sup. Ct. Feb. 10, 2009) (citing *Fiorenza v. Fremont Inv. & Loan*, No. 08-858, 2008 WL 2517139 (S.D.N.Y. June 20, 2008)). *See generally* *Mortgage Elec. Registration Sys., Inc. v. Maniscalco*, 848 N.Y.S.2d 766 (App. Div. 2007); *JP Morgan Chase Bank v. Tecl*, 808 N.Y.S.2d 432 (App. Div. 2005); *Delta Funding Corp. v. Murdaugh*, 774 N.Y.S.2d 797 (App. Div. 2004); *Bankers Trust Co. of Cal., N.A. v. Ward*, 703 N.Y.S.2d 504 (App. Div. 2000); *Berkeley Fed. Bank & Trust, FSB v. Siegel*, 669 N.Y.S.2d 334 (App. Div. 1998); *Horowitz v. Griggs*, 666 N.Y.S.2d 480 (App. Div. 1997); *First Trust Nat'l Ass'n v. Chiang*, 662 N.Y.S.2d 136 (App. Div. 1997); *HSBC Bank USA v.*

Real Estate Settlement Procedures Act (“RESPA”)<sup>177</sup> and bankruptcy laws, the New York State Home Equity Theft Protection Act<sup>178</sup> and Deceptive Practices Act,<sup>179</sup> and statutory

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Picarelli, 889 N.Y.S.2d 882, No. 51107(U), 2009 WL 1585773 (Sup. Ct. Apr. 14, 2009) (unreported disposition); LaSalle Bank, NA v. Shearon, 881 N.Y.S.2d 599, 602 (Sup. Ct. 2009); Sutherland v. Remax 2000, 20 Misc.3d 1131(A), No. 51701(U), 2008 WL 3307201 (N.Y. Sup. Ct. Aug. 7, 2008) (unreported disposition); Fremont Inv. & Loan v. Edwardsen, 867 N.Y.S.2d 374, No. 51349(U), 2008 WL 2653287 (Sup. Ct. June 18, 2008); Collier v. Home Plus Assocs., 856 N.Y.S.2d 497, No. 52526(U), 2007 WL 4793201 (Sup. Ct. Dec. 21, 2007) (unreported disposition); Aurora Loan Servs. v. Grant, 851 N.Y.S.2d 56, No. 51793(U), 2007 WL 2768915 (Sup. Ct. Aug. 29, 2007) (unreported disposition); Beneficial Homeowner Serv. Corp. v. Butler, 836 N.Y.S.2d 491, No. 50278(U), 2007 WL 5192276 (Sup. Ct. Feb. 16, 2007) (unreported disposition); Bank of N.Y. v. Walden, 751 N.Y.S.2d 341 (Sup. Ct. 2002); Bankers Trust v. McFarland, 743 N.Y.S.2d 804 (Sup. Ct. 2002); Bankers Trust Co. of Cal. v. Payne, 730 N.Y.S.2d 200 (Sup. Ct. 2001); Gender Servs., Inc. v. Johnson, 439 N.Y.S.2d 794 (Sup. Ct. 1981).

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

178. Home Equity Theft Protection Act, 2006 N.Y. Sess. Laws ch. 308 (codified as amended at N.Y. BANKING LAW § 595-a (McKinney 2009)); N.Y. REAL PROP. LAW § 265-a). The law is intended to protect homeowners in financial distress—particularly those who are poor, elderly, or financially unsophisticated—from selling their home equity for a fraction of its fair market value as a result of misrepresentations, deceit, intimidation, or other unreasonable commercial practices by equity purchasers. N.Y. REAL PROP. LAW § 265-a(1)(a). The statute provides that the terms and conditions of equity purchases be set forth in written agreements that must conform with statutory requirements regarding print size, the identity of parties, the consideration recited, the description of the mortgaged property, terms of payment, terms of lease or reconveyance, notice of cancellation, and duration. *Id.* § 265-a(3)-(7). Non-compliance with the provisions of RPL 265-a precludes equity purchasers from obtaining or enforcing judgments of foreclosure and sale for the property. *See* First Nat’l Bank of Chicago v. Silver, No. 2010-02511, 2010 WL 1078805 (N.Y. App. Div. Mar. 23, 2010) (holding that a plaintiff mortgagee’s service of the statutorily-specific HETPA notice upon the defendant mortgagor with the summons and complaint is a condition precedent that must be affirmatively pleaded and proven, and that the mortgagee’s failure to do so requires the dismissal of the foreclosure

protections against high-cost home loans,<sup>180</sup> and may help renegotiate payment terms and assure that relevant legal procedures are followed.<sup>181</sup>

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

*Pro bono* legal services are necessary to the success of

proceeding); *WMC Mortgage Corp. v. Thompson*, 877 N.Y.S.2d 885, 886 (Sup. Ct. 2009); *Deutsche Bank Trust Co. Ams. v. Eisenberg*, 890 N.Y.S.2d 368, No. 51271(U), 2009 WL 1789407 (Sup. Ct. June 23, 2009) (unreported disposition); *HSBC Bank USA, N.A. v. Boucher*, No. 27200-2008, 2009 WL 2355630 (N.Y. Sup. Ct. 2009) (unreported disposition); *Wash. Mut. Bank v. Sholomov*, 862 N.Y.S.2d 890, 893-94 (Sup. Ct. 2008); *Countrywide Home Loans, Inc. v. Taylor*, 843 N.Y.S.2d 495, 498-99 (Sup. Ct. 2007). *But see* *Trustco Bank v. Alexander*, 23 Misc. 3d 1129(A), No. 2009-50996(U), 2009 WL 1425247 (N.Y. Sup. Ct. May 9, 2009) (unreported disposition).

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

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

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

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

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

CPLR 3408 in its current form. The New York City Bar Association (“NYCBA”) and the Federal Reserve Bank have co-sponsored the Lawyers’ Foreclosure Intervention Network (“LFIN”), which provides *pro bono* legal services for low-income homeowners facing foreclosure.<sup>184</sup> The program, administered by the NYCBA, trains volunteer attorneys to assist homeowners in (1) assessing their options, (2) negotiating their re-finance arrangements, and (3) defending their cases.<sup>185</sup> A similar program, the Mortgage Foreclosure Pro Bono Project, has been established in Nassau County through the collaboration of the County, the Attorney General’s office, and Nassau/Suffolk Legal Services.<sup>186</sup> This program provides *pro bono* consultation services for homeowners in need.<sup>187</sup> *Pro bono* services will become less necessary only to the extent that the state finds funding for the increased demand for assigned counsel generated by the enactment of CPLR 3408.

## V. Conclusion

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

CPLR 3408 provides a settlement conference mechanism to

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

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

186. *Id.* at 6.

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

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

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