NOTE

RETROACTIVE APPLICATION OF THE NEW YORK FORECLOSURE ABUSE PREVENTION ACT

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At the end of 2022, the New York State Legislature enacted the Foreclosure Abuse Prevention Act ("FAPA"). FAPA brought several significant changes to the then-current statutes and legal rules concerning a mortgagee's ability to toll or reset the statute of limitations of a foreclosure action through voluntary discontinuance. FAPA's enactment spurred a wave of litigation, and the disputes focus heavily on the extent and validity of FAPA's retroactive application. However, the lower courts in New York have issued inconsistent opinions. Given the lack of scholarship and any Court of Appeals decision, this Note ventures to recommend better solutions to the legal questions currently in contention and provide more coherent rules and standards for future cases. It argues that FAPA's urgent remedial goal lowers the hurdle to overcome presumption against retroactivity under state common law. It then distinguishes, more clearly than the current FAPA case law, what events or prior court decisions in a foreclosure action should vest within the mortgagee a property or due process right that cannot be violated by retroactive application. Finally, it notes that if FAPA's retroactive application substantially impairs express

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contract terms, it would violate the Contract Clause of the Constitution, despite the exception elaborated by the Second Circuit.

I. INTRODUCTION

In New York, once a lender makes the decision to exercise its right to accelerate a loan after the borrower's default, it has six years to initiate a foreclosure action before losing the right to recover the debt in court.[1] In addition, for more than a century, lenders in New York who invoke acceleration have had a contractual right to discontinue a foreclosure action and revoke the acceleration by an affirmative act during the six-year statute of limitations period; an acceleration would "'become final and irrevocable' only after the borrower changed its position in reliance of that election by executing a

[1] N.Y. C.P.L.R. 213 (MCKINNEY 2022).

new mortgage."[2] The effect of such "act of revocation," also known as de-acceleration, is "retur[ning] the parties to their pre-acceleration rights and obligations," and "removing the obligation to immediately repay the total outstanding balance due on the loan," thus giving borrowers "a renewed opportunity to remain in their homes, despite a prior default."[3]

There are many reasons why a lender might want to revoke a foreclosure action, and such voluntary discontinuance can sometimes benefit both the lender and the borrower. For instance, a borrower and lender might be able to agree on a loss mitigation option during the pendency of the foreclosure case, and the lender can then "de-accelerate" the loan, giving the borrower another chance to resolve the delinquency and stay in their home.[4] However, a less friendly motivation for voluntary discontinuance is that the lender may be able to effectively toll or reset the six-year statute of limitations of a foreclosure action if the discontinuance occurred within that period.[5] In such scenarios, after conducting a voluntary discontinuance, a lender would be able to recommence the foreclosure action against the borrower more than six years after the prior acceleration.

The mortgagees' contractual right to revoke acceleration through voluntary discontinuance was most recently reaffirmed in 2021 by the New York Court of Appeals in

[2] Freedom Mortg. Corp. v. Engel, 37 N.Y.3d 1, 28 (N.Y. 2021); *see* Kilpatrick v. Germania Life Ins. Co., 75 N.E. 1124, 1125 (N.Y. 1905); *see also* Fed. Nat'l Mortg. Ass'n v. Mebane, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 2d Dep't 1994) (citing Golden v. Ramapo Improvement Corp., 432 N.Y.S.2d 238, 241 (N.Y. App. Div. 2d Dep't 1980)).

[3] *Engel*, 37 N.Y.3d at 28.

[4] *See* Krista Cooley & Francis L. Doorley, *The Past is the Present? New York Legislature Passes Retroactive Foreclosure Bill*, MAYER BROWN (May 17, 2022), https://www.mayerbrown.com/en/perspectives-events/publications/2022/05/the-past-is-the-present-new-york-legislature-passes-retroactive-foreclosure-bill [https://perma.cc/WR9Z-8D5U].

[5] *See* Steve Goode, *N.Y. Senate Passes Foreclosure Abuse Prevention Bill*, NAT'L MORTG. PRO. (May 4, 2022), https://nationalmortgageprofessional.com/news/ny-senate-passes-foreclosure-abuse-prevention-bill [https://perma.cc/N4S2-UT8J].

Freedom Mortgage Corp. v. Engel.[6] In *Engel*, the Court of Appeals clarified that when a mortgage loan is accelerated by the commencement of a foreclosure action, the mortgagee's "voluntary discontinuance of that action . . . constitutes a revocation of that acceleration."[7] Furthermore, such revocation, if conducted within the six-year statute of limitations period, would in effect reset the statute of limitations period for a foreclosure claim until the next acceleration, rendering a new foreclosure action within six years of a subsequent acceleration valid and not time-barred.[8]

On December 30, 2022, New York State Senate Bill S5473D, also known as the Foreclosure Abuse Prevention Act ("FAPA"), went into effect. FAPA brought several significant changes to the then-current statutes and aforementioned legal rules concerning foreclosure actions. Subdivisions (4) and (5) of General Obligations Law Section 17-105 were amended as follows:

> [T]o clarify that these subdivisions represent the exclusive means by which parties are enabled to effectuate a waiver, postponement, cancellation, resetting, tolling, revival or extension of time limited by statute for commencement of an action or proceeding and interposition of a claim to foreclose a mortgage.[9]

A new subdivision (h) was added to the New York Civil Practice Law and Rules ("CPLR") section 203, providing that:

> [O]nce a cause of action . . . has accrued, no party may, in form or effect, unilaterally 'de-accrue' the cause of action or otherwise effectuate a unilateral extension of the limitations period prescribed by statute to

[6] *Engel*, 37 N.Y.3d at 1–2.

[7] *Id.* at 31–32.

[8] *Id.* at 34 (holding that since a prior election to accelerate was revoked, and the present action was commenced within six years of a subsequent acceleration, the Appellate Division erred in granting the borrower's motion to dismiss the present action on statute of limitations grounds).

[9] N.Y. GEN. OBLIG. LAW § 17-105 (MCKINNEY 2022); S.B. S5473D § 3 (N.Y. 2021).

> commence an action and to interpose the claim, unless expressly prescribed by statute.10

And most importantly, FAPA amended CPLR section 3217 by adding a new subdivision (e):

> [To] clarify that the voluntary dismissal or discontinuance of any action upon an instrument described in CPLR 213 (4), including an action to foreclose a mortgage, by any means, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive, or reset the applicable limitations period, or the expiration thereof, unless expressly prescribed by statute. Once a cause of action has accrued, CPLR 3217 (e) clarifies that the voluntary dismissal or discontinuance of an action upon an instrument described under CPLR 213 (4) shall not effectuate a "de-accrual" of the cause of action.[11]

In short, FAPA stipulates that lenders can no longer de-accelerate and toll/reset the statute of limitations by voluntary discontinuance. It still allows borrowers to agree, in the mortgage contract, to postpone, cancel, reset, toll, revive or otherwise extend the six-year statute of limitations, but such an agreement suspending the six-year statute of limitations may only reset the statute of limitations for six years from the date of that agreement.[12] In effect, FAPA essentially abrogates *Engel* and its predecessors discussed earlier. Senator James Sanders Jr., introducer of the bill, commented that FAPA will "go a long way in helping homeowners save their homes from foreclosure by leveling the playing field by eliminating certain abuses lenders have used in courts to the detriment of the homeowners,"[13] and that it provides "needed clarification to correct recent judicial

[10] N.Y. C.P.L.R. 203 (MCKINNEY 2022); S.B. S5473D § 4 (N.Y. 2021).

[11] N.Y. C.P.L.R. 3217(e) (MCKINNEY 2022); S.B. S5473D § 8 (N.Y. 2021).

[12] *See* N.Y. GEN. OBLIG. LAW § 17-105(1) (MCKINNEY 2022).

[13] James Sanders Jr., *Senate Passes Senator Sanders' "Foreclosure Abuse Prevention Act" Legislation*, N.Y. STATE SENATE (May 3, 2022), https://www.nysenate.gov/newsroom/articles/2022/james-sanders/senate-passes-senator-sanders-foreclosure-abuse-prevention-act [https://perma.cc/KV5C-Q9Y9].

decisions," including *Engel*, which have "excuse[d] financial institutions from the effects of longstanding statute of limitations principles" to "take advantage of struggling homeowners."[14]

FAPA's enactment spurred a wave of litigation in New York. These cases center on disputes regarding the extent and validity of FAPA's retroactive application, since FAPA could render countless foreclosure actions—which have been restarted after a prior de-acceleration—now time-barred under the six-year statute of limitations. Pursuant to its text, FAPA was to take effect "immediately" upon enactment applicable to "all [foreclosure] actions . . . in which a final judgment of foreclosure and sale has not been enforced."[15] This seemingly unequivocal requirement, however, has been interpreted in differing ways by the New York Supreme Court in various counties, leading to conflicting rulings in FAPA's retroactive application.[16] Litigants have also challenged whether FAPA's retroactive application violates the State and Federal Constitution. Numerous mortgage holders in these cases have argued that retroactive application of FAPA would impair their contract, property, and due process rights.[17] At the time of the writing of this Note, FAPA has been in effect for two years or so, and there has not been any opinion from the New York Court of Appeals on these issues. Some cases have reached the Appellate Divisions, but they have often remitted difficult questions, such as the constitutionality analysis, to the lower courts.[18] As for federal court actions, there are a few district court cases, and they have generally based their decisions on the state lower court rulings. Thus, the above issues have mostly been addressed at the state trial

[14] *Id.*

[15] S.B. S5473D § 10 (N.Y. 2021).

[16] *See infra* Section II.

[17] *Id.*

[18] *See, e.g.*, Ronan, LLC v. Hanipoly, 199 N.Y.S.3d 652 (N.Y. App. Div. 2d Dep't 2023) (remanding the case to the trial court since it did not consider the issues raised by the plaintiff related to the constitutionality of FAPA's retroactive application).

court level, and these lower courts have produced inconsistent results.

This Note ventures to summarize, clarify, and provide better answers to legal questions regarding the validity of FAPA's retroactive application in face of the ambiguities in the lower courts, the limited opinions from the appellate courts, and the lack of scholarly work discussing such issues. In Part II, I summarize and examine the existing case law on FAPA, surveying any commonalities and conflicts. In Part III, I offer critique on some court opinions and recommend better approaches by interpreting FAPA's text and examining the legislative intent. The analyses in both parts will be conducted in light of New York's common law rules on statutory retroactivity.

II. CASE LAW ON STATUTORY RETROACTIVITY IN NEW YORK AND FAPA'S RETROACTIVE APPLICATION

The available case law discussing FAPA's retroactive application is somewhat limited due to the recency of the bill's enactment. Most published opinions were issued by the New York Supreme Court. These lower courts, across a number of counties, have not been in agreement. The following subsections lay out the key steps and tests that the courts have developed for the retroactivity analysis, as well as how they have been applied in FAPA cases. At the time of this Note's drafting, new cases concerning FAPA's retroactive application are actively being filed and litigated.

A. Presumption Against Retroactivity

The first step that a court usually takes in the retroactivity inquiry is determining whether there is a presumption against retroactivity regarding the statute in question. State courts have pointed out that retroactivity is generally disfavored because principles of fairness dictate that individuals "should have an opportunity to know what the law

is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted."[19] This presumption against retroactivity is triggered when the legislation has retroactive effect, which means if applied to past conduct, it would "impair [the substantive] rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[20] In deciding whether there is retroactive effect, courts ask whether the law "attaches new legal consequences" to events completed before enactment,[21] and if the presumption is triggered, generally, the statute should be applied prospectively.[22]

By its plain language, FAPA provides that it was to take effect "immediately" upon enactment in "all [foreclosure] actions . . . in which a final judgment of foreclosure and sale has not been enforced,"[23] which suggests that FAPA can be applied to pending foreclosure actions initiated before its enactment. However, such applications have not necessarily yielded retroactive effects. In *Ditech Financial LLC v. Naidu*, for instance, a foreclosure action was commenced in 2009 but then discontinued in 2014; a second action was brought in 2016.[24] When the mortgagor challenged the second action on the six-year statute of limitations grounds, the Court of Appeals, pursuant to its new 2021 *Engel* ruling, reversed a 2019 Appellate Division decision in the same matter by holding that the mortgagee's filing of a stipulation of discontinuance constituted de-acceleration, resetting the statute of limitations.[25] After FAPA's enactment, mortgagor

[19] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925 (Table), at *13 (N.Y. Sup. Ct. Oct. 31, 2023) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

[20] *Id.* at *26 (quoting Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Community Renewal, 154 N.E.3d 972, 988 (N.Y. 2020)).

[21] *Am. Econ. Ins. Co. v. State,* 87 N.E.3d 126, 134 (N.Y. 2017).

[22] Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Community Renewal, 154 N.E.3d 972, 991 (N.Y. 2020).

[23] S.B. S5473D § 10 (N.Y. 2021).

[24] Ditech Fin. LLC v. Naidu, 206 N.Y.S.3d 441, 447 (N.Y. Sup. Ct. 2023).

[25] *Id.* at 447–48.

filed a motion to renew and argued that FAPA would now establish the statute of limitations defense that was dismissed.[26] The Supreme Court in Queens County granted the motion and applied FAPA retroactively; it stated that there is no presumption against applying FAPA retroactively in this case because here FAPA does not "attach new legal consequences to events completed" but rather "restores the legal consequence of plaintiff's 2009 discontinuance," namely the Appellate Division's decision in 2019 that there was no valid de-acceleration.[27] In other words, restoring a prior ruling before *Engel* is not deemed an attachment of *new* legal consequences.

In the majority of existing FAPA cases, however, there is not a prior pre-*Engel* ruling as in *Naidu*. In these cases, the discontinuance, pursuant to *Engel*, had always been deemed a valid de-acceleration tolling or resetting the statute of limitations;[28] applying FAPA retroactively would reverse that ruling and thus attach a new legal consequence, not restore one. Therefore, courts facing a challenge of FAPA's retroactive application in such cases acknowledged that FAPA's application would have retroactive effect. In *U.S. Bank National Association v. Speller*, for example, the Putnam County Supreme Court noted that applying FAPA retroactively to the mortgagee's fourth foreclosure action would render the parties' Repayment Plan agreement ineffective as a means to revoke its prior acceleration, reinstate the parties' rights and obligations, and "de-accrue" the prior claim to recover the debt for purposes of the statute of limitations; FAPA would then have a plain retroactive effect impairing contractual rights, "upsetting reliance interests and triggering fundamental concerns about fairness."[29] Nonetheless, even if the presumption against retroactivity is

[26] *Id.* at 449.

[27] *Id.* at 449.

[28] *See, e.g.*, U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 667 (N.Y. Sup. Ct. 2023).

[29] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925, at *16 (N.Y. Sup. Ct. Oct. 31, 2023).

triggered in these scenarios, it would not be the end of the inquiry. Instead of directly ruling against retroactivity, the courts would move on to the second step: the *Matter of Gleason* test. This turns out to be an issue on which the lower courts have differing opinions.

B. The Matter of Gleason *Test*

In 2001, the Court of Appeals elucidated in *Matter of Gleason* that statutes with retroactive effects and presumption against retroactivity may still be applied retroactively if "the Legislature's preference for retroactivity is explicitly stated or clearly indicated," and "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose."[30] A remedial statute is designed to "correct imperfections in prior law by generally giving relief to the aggrieved party."[31] In addition, other factors to consider in the retroactivity analysis include, "whether the legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be."[32] This is the *Matter of Gleason* test.

Many of the existing FAPA cases have acknowledged that the legislature clearly intended FAPA to be applied retroactively and that FAPA is a remedial law. In *U.S. Bank Trust v. Miele*, the Supreme & County Court of Westchester County noted the legislative intent behind FAPA and determined that FAPA's "remedial aim" is "to thwart and eliminate abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs."[33] The legislature's preference for retroactivity and sense of urgency is also

[30] *In re* Gleason (Michael Vee, Ltd.), 749 N.E.2d 724, 726 (N.Y. 2001).

[31] *See* Nelson v. HSBC Bank USA, 929 N.Y.S.2d 259, 263 (N.Y. App. Div. 2d Dep't 2011).

[32] *Gleason*, 749 N.E.2d at 726.

[33] *Miele*, 197 N.Y.S.3d at 666.

evident in the language of Section 10, that the act "shall take effect *immediately* and shall apply to all . . . [foreclosure actions] in which a final judgment of foreclosure and sale has not been enforced."[34] Likewise, the Nassau County Supreme Court noted in *U.S. Bank Trust v. Leonardo* that FAPA's sponsors described the statute as "remedial legislation" seeking to "level the playing field for all parties engaged in litigation . . . and ensure the statute of limitations not only applies equally to all but is impervious to unilateral manipulation."[35] In these cases, FAPA passes the *Matter of Gleason* test and qualifies as a remedial legislation warranting retroactive application to effectuate the aim of eliminating abusive tactics.

The line of FAPA cases in the Putnam Supreme and County Court, however, rules otherwise. The court there stated that "classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law."[36] Considering the other factors in the *Matter of Gleason* balancing test, despite the urgency that may be implied by the word "immediate," the court noted that FAPA is "silent on the issue of retroactivity" and that "there is no indication whatsoever that the Legislature contemplated the statute's retroactive impact on lenders' substantive rights and intended the extraordinary impairment of those rights that retroactivity would in fact impose."[37] The court also determined that FAPA does not reaffirm or clarify what the prior law was "always meant to say and do," but rather changes it, thus weighing in favor of preserving the

[34] *Id.* at 662 (emphasis added).

[35] U.S. Bank Tr., N.A. v. Leonardo, 192 N.Y.S.3d 472, 476 (N.Y Sup. Ct. 2023) (quoting S.B. S4573D, Sponsor Memo (2022)).

[36] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925, at *16 (N.Y. Sup. Ct. Oct. 31, 2023) (quoting Majewski v. Broadalbin-Perth Cent. Sch. Dist., 696 N.E.2d 978, 981 (N.Y. 1998)).

[37] *Id.* at *17.

presumption against retroactivity.[38] As a result, the court ruled that the factors in *Matter of Gleason* counsels against retroactive application.

Surviving the *Matter of Gleason* test still would not automatically justify FAPA's retroactive application, since it is ultimately a test on whether the legislature intended the statute to be applied retroactively despite potential retroactive effects. Even if the courts believe that the legislature's remedial aim is established and the statute's purpose clear, as in the case in *Miele* and *Leonardo*, the courts still have to conduct a final step of analysis: whether the retroactive effect of the law, under the circumstances of a particular case, impairs the parties' vested rights so severely that it overshadows the statute's remedial aim and violates fundamental principles of fairness or even the State or Federal Constitution. As explained below, the answers to this inquiry have also been unclear and inconsistent, despite the statute's seemingly unequivocal language.

C. Vested Rights and Constitutionality

FAPA "shall take effect immediately and shall apply to all residential and commercial foreclosure actions in which a final judgment of foreclosure and sale has not been enforced."[39] However, even in a foreclosure action where a final judgment of foreclosure and sale ("JFS") has not been enforced, many New York Supreme Court decisions have denied retroactive application where it would severely impair the mortgagees' vested rights and interests. In their opinions, the courts note that they would defer to the legislative intent

[38] *Id.* at *17 (quoting Brothers v. Florence, 739 N.E.2d 733, 737 (N.Y. 2000)). *See also id.* at *13–14 (arguing that pre-*Engel*, unilateral deacceleration had always been deemed a valid method of resetting statute of limitations by the NY courts; although the Sponsors implies that the 1963 law precludes resetting the statute of limitations by unilateral revocation and that FAPA merely restores and clarifies that law by overruling *Engel*, FAPA is really changing the longstanding law by disallowing any unilateral act to toll or reset the statute of limitations unless expressly prescribed by statute).

[39] S.B. S5473D § 10 (N.Y. 2021).

for retroactivity unless such application "reaches so far into the past or so unfairly as to constitute a deprivation of property without due process," and results in "an interpretation which is contrary to the dictates of reason or leads to unreasonable results."[40] I explain a few cases below to demonstrate the current rule on this issue and the problems that it may present to those looking for guidance.

i. Vested Rights Granted by Prior Court Decisions

The courts have ruled that vested rights may be obtained by the mortgagee from prior court decisions in the same controversy, such as a prior summary judgment, and such vested rights cannot be impaired by retroactive application of FAPA despite the statute's remedial nature.

In *Leonardo*, for example, the plaintiff-mortgagee's predecessor-in-interest commenced a foreclosure action in 2013 against mortgagor.[41] A JFS was issued by the court in 2015. Throughout the ensuing eight years, however, the mortgagor filed numerous motions to vacate the judgment, reargue, and appeal, so the 2015 JFS was never truly enforced, and the property never sold.[42] FAPA went into effect while the litigation was still pending, and subsequent to the enactment, the mortgagor filed another motion to vacate the 2015 JFS and dismiss the action on the ground that the action was barred by the statute of limitations, given FAPA's retroactive application.[43]

The Supreme Court, Nassau County, first noted that FAPA applies to all actions in which a final JFS has not been *enforced* and acknowledged that in general, "*enforcement* of a foreclosure judgment occurs upon the conducting of the sale."[44] However, the court also stated that it is well-settled law that property rights "vested by courts' prior actions are

[40] *Leonardo*, 192 N.Y.S.3d at 475.

[41] *Id.* at 473.

[42] *Id.* at 473–74.

[43] *Id.* at 474.

[44] *Id.* at 474–75 (emphasis added).

placed beyond the reach of legislative power."[45] The 2015 JFS, although not having resulted in an actual sale and thus not enforced, should still have granted a *vested property interest* in plaintiff-mortgagee, who had attempted to enforce the judgment by scheduling a sale despite excessive delay from mortgagor's failed motions.[46] If FAPA were retroactively applied in this situation, the court reasoned, it would deny the mortgagee, who had taken significant efforts toward the enforcement of the foreclosure judgment, "the fruits of their judgment, which by virtue of the adjudication are vested property rights."[47] Despite the clear legislative intent to apply FAPA retroactively, the court nonetheless held that FAPA "cannot be reasonably construed as to have been intended to instead provide a savvy and/or litigious defendant the infinite opportunity to prevent a plaintiff from enforcing their judgment and reaching the case's conclusion," which would lead to "patently unreasonable results."[48] Consequently, the court ruled that once a sale has been scheduled, even if not completed, the JFS would be deemed "enforced," and the mortgagee would gain a vested property right beyond the reach of FAPA.[49] The mortgagor's motion was thus denied.

Similarly, in *MTGLQ Investors, L.P. v. Gross*, a mortgagee brought a foreclosure action in 2010 but then voluntarily discontinued a few years later, thereby revoking the acceleration and resetting the statute of limitations under existing laws at the time.[50] The mortgagee later brought a new foreclosure action on the same mortgage in 2019, and the court granted summary judgment in favor of the mortgagee in May 2022.[51] After FAPA went into effect later that year, mortgagors filed a motion to renew, arguing that FAPA should

[45] *Id.* at 475 (quoting People *ex rel.* H.D.H. Realty Corp. v. Murphy, 186 N.Y.S. 38, 44 (N.Y. App. Div. 1st Dep't 1920), *aff'd*, 130 N.E. 923 (N.Y. 1921)).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 476.

[49] *Id.* at 476–77.

[50] MTGLQ Invs., L.P. v. Gross, 190 N.Y.S.3d 244, 250 (N.Y. Sup. Ct. 2023).

[51] *Id.* at 249.

be applied retroactively and that FAPA rendered mortgagee's 2019 foreclosure action time-barred.[52] The Supreme & County Court of Westchester County denied the motion. In the vein of Nassau County's reasoning, the court noted that despite FAPA's legislative intent to eliminate abusive tactics, if its retroactive application destroys accrued rights under existing laws or a prior court's determination, then FAPA would be invalid.[53] The court reasoned that "while summary judgment is *not* a final [JFS], application of FAPA in the instant matter would have a retroactive effect on Plaintiff's vested rights obtained through the prior determination of the court."[54] The court stated that FAPA "was not intended to be used as a means to reach back in the case history and bypass determinations rendered by courts," and that retroactive application of FAPA would completely disable the plaintiff mortgagee's 2019 action despite the accrued judgment in its favor under the existing laws.[55]

Interestingly, the same court in *Gross* has also allowed retroactive application in a case with a prior JFS. In *Miele*, a mortgagee's predecessor brought an action against mortgagor Miele in 2009. In 2015, U.S. Bank Trust, the then-present mortgagee, sent Miele letters purportedly de-accelerating the debt and reinstituting the loan as an installment.[56] In 2016, mortgagee commenced a second action against Miele, who filed a motion to dismiss, claiming that the action was time-barred because it was commenced beyond the six-year statute of limitations that was triggered in 2009.[57] The court denied the motion and determined that the acceleration in 2009 was revoked by plaintiff-mortgagee's deacceleration letters in 2015, so the statute of limitations was tolled under existing laws, and the second action was thus timely.[58] A JFS was

[52] *Id.*

[53] *Id.*

[54] *Id.* at 250 (emphasis added).

[55] *Id.*

[56] U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 661 (N.Y. Sup. Ct. 2023).

[57] *Id.* at 661–62.

[58] *Id.* at 662.

issued in January 2023, for the mortgagee, but in response to the introduction of FAPA in 2022, Miele then filed a motion to renew the prior motion to dismiss, arguing that FAPA should be applied retroactively.[59] Here, the Westchester County court again acknowledged that retroactive application of FAPA should not be warranted if it would deprive mortgagee of vested property rights,[60] but it then determined that the mortgagee failed to establish that retroactive application of FAPA would impair its vested property rights: a final JFS was not entered or enforced "*on the effective date* of FAPA" at the end of 2022, and "litigants do not obtain any vested property rights in the orders or judgments of the court *during the period they are subject to review by a higher court*."[61] The court then applied FAPA retroactively and granted defendant-mortgagor's renewed motion to dismiss the foreclosure action.

At a glance, the *Miele* ruling seems to be in conflict with *Gross* and *Leonardo*. In *Gross* and *Leonardo*, a prior summary judgment or final JFS issued before FAPA's enactment date, even though not enforced through a sale of the property, was deemed to have granted vested property right in the mortgagee that FAPA cannot impair. On the other hand, in *Miele*, even though a final judgment was also entered for the mortgagee, it was not enough to establish such vested rights. I tackle this issue and analyze the merit of these rulings in more detail in Part III.

ii. Vested Rights Granted by Reliance on Past Rulings

In using the vested rights doctrine to defend against FAPA's retroactive application, mortgagees have also argued that their reliance on past rulings in New York, especially *Engel*, establishes vested (property) rights that cannot be violated by FAPA. The courts have denied such defenses in

[59] *Id.*

[60] *Id.* at 668–69.

[61] *Id.* at 669 (emphasis added).

cases where a mortgagee's prior discontinuance occurred before the *Engel* decision.

In *HSBC Bank USA, N.A. v. IPA Asset Management, LLC*, the mortgagee initiated a first foreclosure action in 2008, which was then discontinued in 2011; a second foreclosure action in 2012, which was again discontinued in 2017; and a final foreclosure action two days before FAPA's enactment.[62] The mortgagor then brought a motion to dismiss the third action arguing that FAPA should be applied retroactively and render the action time-barred.[63] The mortgagee, on the other hand, argued that FAPA's retroactive application would violate its vested property right—i.e., a lienhold created by its reliance on *Engel*.[64] The Suffolk County Supreme Court granted the motion and refuted the mortgagee's argument, stating that since both discontinuances were pre-*Engel*, there is no abrogation of the mortgagee's vested property rights "as there was no reasonable reliance upon *Engel* when the plaintiff discontinued this action" to establish those rights.[65]

The Putnam Supreme and County Court adopted a similar rationale. In *U.S. Bank National Association v. Williams*, the court noted that the mortgagee cannot claim to have a vested interest in the law as pronounced in *Engel*, since that case was determined over nine years after the mortgagee's voluntarily discontinuance of a prior foreclosure action.[66] The court thus reasoned that the mortgagee could not have had any "reasonable expectation that the statute of limitations was reset by its discontinuance given the legal landscape" pre-*Engel*. The pre-*Engel* landscape was indeed such that a lender's unilateral discontinuance of a foreclosure action could not conclusively reset the statute of limitations.[67]

[62] HSBC Bank USA, N.A. v. IPA Asset Mgt., LLC, 190 N.Y.S.3d 622, 623–24 (N.Y. Sup. Ct. 2023).

[63] *Id.* at 624.

[64] *Id.* at 625.

[65] *Id.*

[66] U.S. Bank Nat'l Ass'n v. Williams, 195 N.Y.S.3d 392, 399 (N.Y. Sup. Ct. 2023).

[67] *Id.*

Without such expectation at the time of discontinuance, no vested right could be obtained.

These two cases establish when a mortgagee discontinued its prior foreclosure action pre-*Engel*, there can be no reliance on *Engel* to justify a protected vested right. However, this leaves open the question of whether such reliance may be established if the discontinuance occurred after the *Engel* ruling. It may be implied from the reasoning in *IPA* and *Williams* that in such scenarios, reliance on *Engel* can be established and would vest property rights in the mortgagee so that FAPA's retroactive application cannot be justified. There is no existing FAPA case law on this question, and further scrutiny is warranted in light of potential future cases.

iii. Vested Rights Granted by the Constitution

It should be noted that the constitutionality analysis is closely intertwined with the issues discussed above. For instance, the question of the existence of vested property rights granted by prior decisions often originates from a mortgagee's contention that retroactive application of FAPA violates the Takings Clause of the Constitution.[68] However, other constitutionality issues, including FAPA's potential violations of the Contract Clause and the mortgagee's due process rights, are also heavily debated in courts.

In *Miele*, for instance, the Westchester County court addressed the constitutionality of FAPA's retroactive application. The mortgagee argued that retroactive application of FAPA would violate the Contract Clause, the Takings Clause, and the mortgagee's due process rights under the Constitution.[69] The court first noted that "constitutional impediments to retroactive civil legislation are now modest,"[70] and that "it is well settled that [the] acts of the Legislature

[68] *See* U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 668 (N.Y. Sup. Ct. 2023).

[69] *Id.* at 663.

[70] *Id.* at 667 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994)).

are entitled to a strong presumption of constitutionality."[71] Other courts have also relied on this principle in their analysis of FAPA's constitutionality, noting that plaintiffs bear "the burden of overcoming this presumption by demonstrating the unconstitutionality of the legislation beyond a reasonable doubt."[72] In most cases, the plaintiff-mortgagees have not been able to overcome that burden.

First of all, for claims that FAPA's retroactive application would violate the Contract Clause, the courts have never found such violation when there are no explicit terms regarding voluntary discontinuance or resetting the statute of limitations in the mortgage agreement itself. For example, the Suffolk County Supreme Court reasoned in *IPA* that "to establish a violation of the Contract Clause, there must be a substantial impairment of a contractual right."[73] In that case, the mortgagee did not point to any specific clause in the mortgage agreement that would have been impaired by FAPA, and there existed "no right to de-accelerate the loan in either the mortgage or the note."[74] Other courts have adopted the same reasoning when there is no right or terms mutually agreed upon in the mortgage agreement that would have been impaired by FAPA's retroactive application.[75] The story is understandably different, however, when there is an express provision in the agreement setting forth what a note holder must do to revoke an election to accelerate the debt. In *Speller*, both the lender and the borrower mutually agreed to discontinue the 2009 foreclosure action and reinstate the borrowers' right to pay the mortgage in installments. Under

[71] *Id.* (quoting Am. Econ. Ins. Co. v. State, 87 N.E.3d 126, 135 (N.Y. 2017)).

[72] Deutsche Bank Nat'l Tr. Co. v. Dagrin, 190 N.Y.S.3d 582, 587 (N.Y. Sup. Ct. 2023) (quoting Am. Econ. Ins. Co. v. State, 87 N.E.3d 126, 135 (N.Y. 2017)), *aff'd*, Deutsche Bank Nat'l Tr. Co. v. Dagrin, 226 N.Y.S.3d 75 (N.Y. App. Div. 2d Dep't 2024).

[73] HSBC Bank USA, N.A. v. IPA Asset Mgt., LLC, 190 N.Y.S.3d 622, 626 (N.Y. Sup. Ct. 2023).

[74] *Id.*

[75] *See, e.g.*, U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 667–68 (N.Y. Sup. Ct. 2023); *see also* Ditech Fin. LLC v. Naidu, 206 N.Y.S.3d 441, 456 (N.Y. Sup. Ct. 2023).

prevailing law at the time, the agreement was effective to revoke the lender's election to accelerate and "de-accrue" its claim to recover the entire mortgage debt.[76] If FAPA is applied retroactively in that case, the court reasoned, it "would invalidate the agreement and, after the fact, erect a statute of limitations bar to the [present] foreclosure action," thus violating the Contract Clause.[77]

Secondly, mortgagees have contended that retroactive application of FAPA would violate substantive due process rights under the Constitution by impairing their "vested right to maintain this action because it was timely commenced" and application of FAPA would "now render it time barred."[78] In face of this challenge, the courts have relied on a rational basis test: "[t]o comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by 'a legitimate legislative purpose furthered by rational means.'"[79] In *Miele*, the court found that statutory retroactivity is integral to FAPA's fundamental objective, and that the legislature had a rational legislative purpose and "persuasive reason" for the "potentially harsh" impact of FAPA's retroactive application: to prevent lenders from abusing the judicial foreclosure process.[80] Since the mortgagee failed to show otherwise, FAPA's retroactive application satisfied due process and was constitutional.[81] Most other courts have also found such rational basis behind FAPA.[82] The Suffolk County Supreme Court, however, stated in *Wilmington Trust v. Gawlowski* that the Court of Appeals has

[76] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925, at *22 (N.Y. Sup. Ct. Oct. 31, 2023).

[77] *Id.*

[78] *Miele*, 197 N.Y.S.3d at 669.

[79] *Id.* (quoting Am. Econ. Ins. Co. v. State, 87 N.E.3d 126, 135 (N.Y. 2017)).

[80] *Miele*, 197 N.Y.S.3d. at 670.

[81] *Id.* at 670.

[82] *See, e.g.*, HSBC Bank USA, N.A. v. IPA Asset Mgt., LLC, 190 N.Y.S.3d 622, 625–26 (N.Y. Sup. Ct. 2023) (finding that the legislative purposes of FAPA was to correct an erroneous interpretation of the law and that the legislation is rationally related to legitimate governmental interest to satisfy due process).

also elaborated a "final judgment" exception to this test "wherein *res judicata* was acknowledged to be a bar to the [retroactive] application."[83] In short, like the vested rights established by prior court decisions, if there has already been a judgment entered that is "not reviewable by a higher court," the plaintiff would have already accrued a vested right that cannot be impaired by retroactive application.[84] Since *Gawloski* involved such a "final order exception," the court did not feel the need to address the rational basis test, and it deemed retroactive application of FAPA violative of the due process rights under the Constitution.[85]

It is also important to note that in *Gawlowski*, the Suffolk County Supreme Court further justified the final order exception by discussing the Separation of Powers Doctrine embedded in the State and Federal Constitution. The doctrine prevents "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands" within the government by precluding the legislature from re-adjudicating controversies that have been litigated in the courts and resolved by final judicial judgment.[86] The Court of Appeals has repeatedly held that the legislature could not annul an "existing complete and final judgment."[87] Applying this doctrine to FAPA, the Suffolk County court found it "impossible to construe" the language in FAPA Section 10 "in any manner which is compatible with the *res judicata* concept of 'final order or judgment,'" and found that such language leads to legislature's attempts to undermine judicial decision making with ease.[88] In other words, the *enforcement* of a final

[83] Wilmington Tr., N.A. v. Gawlowski, 201 N.Y.S.3d 605, 610 (N.Y. Sup. Ct. 2023).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 611 (quoting THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) and 16 AM. JURIS. 2D CONST'L L., *Legislative Interference in Litigation,* § 300).

[87] *Id.* at 612; *see generally, Burch v. Newbury*, 10 N.Y. 374 (1852).

[88] *Gawlowski*, 201 N.Y.S.3d at 612 (the court specifically focused on the language "final judgment of foreclosure and sale is enforced").

JFS can occur after a *res judicata* concept of final judgment is issued, and Section 10's language technically allows retroactive application to potentially alter the final judgments in such cases. Thus, the court declared that Section 10 is a clear violation of the State and Federal Constitution "in *any* proceeding," that involves "relitigation of a final order," as in *Gawlowski*.[89] The subsequent line of cases in Suffolk County has followed suit.[90]

Finally, mortgagees have often argued that FAPA's retroactive application would violate the Takings Clause of the Constitution. Lengthy discussion of the cases here would be redundant since the courts have largely incorporated the Takings Clause analysis within the vested rights analysis. For instance, the court in *Miele* reasoned that FAPA's retroactive application in that case would not violate the Takings Clause because the mortgagee had not identified any vested property rights from prior court decisions, so no private property was taken without just compensation.[91] Nonetheless, what creates or constitutes vested property rights, as discussed earlier, remains somewhat ambiguous.

D. Federal Court Cases

There have been few federal cases on the retroactive application of this relatively new state law. In the small number of cases brought under diversity jurisdiction, the Federal District Court in the Eastern District of New York has largely aligned its opinions towards the limited precedents of the New York Supreme Court. For example, in *Article 13, LLC v. Ponce de Leon Federal Bank*, the defendant-mortgagee argued that FAPA's retroactive application, which was warranted in this pending action after prior denials of both parties' motion for summary judgment, would violate its due

[89] *Id.* (emphasis added).

[90] *See, e.g.*, Boreshesky v. U.S. Bank Tr., N.A., 199 N.Y.S.3d 860, 863 (N.Y. Sup. Ct. 2023).

[91] U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 669 (N.Y. Sup. Ct. 2023).

process rights.[92] Explicitly referencing *Miele*, the court reasoned that since no property right has been vested and that the mortgagee did not meet the burden of showing a lack of "legitimate legislative purpose furthered by rational means" behind FAPA, there would be no violation of due process rights.[93] In *East Fork Funding LLC v. U.S. Bank, N.A.*, also echoing *Miele*, the E.D.N.Y. stated that FAPA's retroactive application would not violate a mortgagee's contract rights when there are no explicit contractual terms about the de-acceleration or tolling of the statute of limitations between the lender and borrower in the mortgage agreement,[94] and FAPA does not prohibit "the parties from agreeing in their mortgage contract that a stipulation or action will de-accelerate the mortgage and reset the statute of limitations;" FAPA only prohibits the mortgagee from *unilaterally* resetting or tolling the statute of limitations, not contractual agreements on such issues in express terms.[95] Outside these questions, however, E.D.N.Y. gave no more guidance on FAPA's retroactive application beyond quoting Section 10, without further explaining what its language might mean under different procedural contexts. Such avoidance is expected. As the court points out, the interpretation of FAPA and its effects on actions is a "quintessential issue of state law" that a state court should decide.[96]

[92] Article 13, LLC v. Ponce de Leon Fed. Bank, 686 F. Supp.3d 212, 218, 220 (E.D.N.Y. 2023) (noting not only that there has been no final judgment of foreclosure and sale, but also that no court order has vested in either party an immediate right to any property, echoing the focus on vested property rights for FAPA's retroactive application in state courts).

[93] *Id.*

[94] E. Fork Funding LLC v. U.S. Bank, N.A., No. 20-CV-3404 (AMD) (RML), 2023 WL 2660645, at *5 (E.D.N.Y. Mar. 23, 2023).

[95] *Id.*

[96] 53rd Street, LLC v. U.S. Bank Nat'l Ass'n, No. 18-CV-4203 (AMD) (VMS), 2023 WL 8283656, at *4 (E.D.N.Y. Nov. 30, 2023).

III. Resolution of Unsettled Conflicts and Issues

The Court of Appeals in New York has never given an opinion on a FAPA case, and the Appellate Divisions have generally remanded cases for consideration of any issues regarding FAPA's constitutionality to the lower courts.[97] Thus, it is important to provide clearer answers and insights to the unresolved questions.

This Section will tackle the following conflicts and questions implicated by the existing lower court decisions. First, ambiguity remains with regard to the nature of the legislative intent behind FAPA. Lower courts are split on whether the legislative purpose and the statute's proposed "remedial aim" would overcome the presumption against retroactivity and pass the *Matter of Gleason* test.[98] This inquiry is also relevant to the constitutionality question, since a "legitimate legislative purpose furthered by rational means" helps fulfill the due process requirement.[99] Second, the trial courts have denied retroactive application if it would impair the mortgagee's vested rights and interest, yet it has been unclear what kind of events, reliance, or prior court decisions would create such rights and interests in foreclosure proceedings. This issue is also highly relevant to the constitutionality analysis since the impairment of vested property right would most likely be a violation of the Takings Clause.[100] Finally, FAPA's potential violations of the Contract Clause and the Separation of Powers Doctrine warrant further scrutiny in light of secondary sources advancing arguments against FAPA's constitutionality.

[97] *See generally*, Johnson v. Cascade Funding Mortg. Tr. 2017-1, 196 N.Y.S.3d 796 (Mem), 799 (N.Y. App. Div. 2d Dep't 2023); U.S. Bank Nat'l Ass'n v. Santos, 193 N.Y.S.3d 271, 273 (N.Y. App. Div. 2d Dep't 2023); U.S. Bank Nat'l Ass'n v. Simon, 191 N.Y.S.3d 61, 63 (N.Y. App. Div. 2d Dep't 2023); Deutsche Bank Nat'l Tr. Co. v. Wong, 193 N.Y.S.3d 243, 246 (N.Y. App. Div. 2d Dep't 2023).

[98] *See supra* notes 33–38.

[99] *See supra* note 79.

[100] *See supra* note 91.

A. Legislative Intent and Passing the Matter of Gleason Test

The state legislature indicated that the main purpose for FAPA's passage was to overturn *Engel* and to eliminate abusive tactics employed by mortgagees to manipulate the statute of limitations. The courts are split on whether such intent passes the *Matter of Gleason* test, and while the courts have mostly viewed such remedial aim as a rational legislative purpose satisfying the Due Process Clause under the Fourteenth Amendment, scholars have raised the argument that the legislature's "knee-jerk reaction to overturn *Engel* is not a persuasive reason for the harsh impact of retroactivity" and thus violates the due process requirement.[101] This Note argues that FAPA's legislative intent is sufficiently persuasive and rational to justify retroactive application.

The first step is taking a closer look at the documents explaining the legislative intent. In the Sponsor Memo, the legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process that has been exacerbated by court decisions, and that "the purpose of the present *remedial* legislation is to clarify the meaning of existing statutes, codify correct judicial applications . . . and rectify erroneous judicial interpretations thereof."[102] It seeks to "*clarify* the existing law and overturn those decisions that have strayed from legislative prescription and intent;" these amendments and clarifications "will . . . apply equally to all litigants, including those currently involved in mortgage foreclosures and related actions."[103] The sponsors found that

[101] Diana M. Eng & Andrea M. Roberts, *Can the Foreclosure Abuse Prevention Act Survive a Constitutional Challenge?* N.Y.L.J. (Jan. 6, 2023), https://www.blankrome.com/publications/can-foreclosure-abuse-prevention-act-survive-constitutional-challenge [https://perma.cc/UAS9-7JDG] (quoting Holly S. Clarendon Tr. v. State Tax Comm'n, 43 N.Y.2d 933, 935 (1978) ("[T]he apparent absence of a persuasive reason for retroactivity, with its potentially harsh effects, offends constitutional limits . . . .")).

[102] S.B. S4573D, Sponsor Memo (2022) (emphasis added).

[103] *Id.* (emphasis added).

the abusive tactics employed by foreclosure plaintiffs have been "sanctioned by the judiciary" and "resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers."[104]

In *Matter of Gleason*, the Court of Appeals ruled that the following axioms should be used to determine whether a statute should be given retroactive effect:

> [Statutory] amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be.[105]

It appears from the ruling here that the *Matter of Gleason* test is a balancing test, with no factor being dispositive in its application. Thus, even if the legislature has not explicitly stated or clearly indicated preference for retroactivity in the bill, it could still be retroactively applied. This is the case in *Matter of Gleason* itself, where the court reasoned that although the legislature did not state that the amended law at hand was to have retroactive effect, the law's swift enactment after a prior case and its direction that the amendment was to "take effect immediately" conveyed "a sense of urgency."[106] The legislative history also establishes that the purpose of the amendment was to "clarify what the law was always meant to do and say."[107] These factors

[104] *Id.*

[105] *In re* Gleason (Michael Vee, Ltd.), 749 N.E.2d 724, 726 (N.Y. 2001).

[106] *Id.*

[107] *Id.* at 726–27.

together persuaded the court that the remedial purpose of the law should be effectuated through retroactive application.

In light of the above, although it also relied on the *Matter of Gleason* test in *Speller*, the Putnam County Supreme Court's application of the test seems flawed. In its ruling against retroactive application, the court's conclusion that FAPA is "silent on the issue of retroactivity" and that there is "no indication whatsoever" that the legislature contemplated the statute's retroactive impact on lenders' substantive right[108] seems inconsiderate. It is true that the Sponsor Memo does not contain words like "retroactivity," but the Court of Appeals stressed that "there is certainly no requirement that particular words be used—and, in some instances retroactive intent can be discerned from the nature of the legislation."[109] Intent for retroactive application can in fact be discerned from other parts of the bill. For example, the language in Section 10 states that the act "shall take effect *immediately* and shall apply to *all . . . actions in which a final judgment of foreclosure and sale has not been enforced*."[110] This strongly indicates that the legislature at least intended or knew that FAPA would be applied retroactively to some if not most pending actions. To say that there is no intention or consideration for retroactivity at all on the legislature's part is thus misguided. In addition, the Queens County Supreme Court found that the word "retroactive" is in fact stated multiple times in the bill jacket, and the bill's title—Foreclosure Abuse Prevention Act—also helps demonstrate the legislature's intent to prevent all foreclosure abuse, not just prospective ones "that occur on newly commenced actions."[111] These evidence show that the

[108] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925 (Table), at *17 (N.Y. Sup. Ct. Oct. 31, 2023).

[109] Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Community Renewal, 154 N.E.3d 972, 991 (N.Y. 2020).

[110] S.B. S5473D § 10 (N.Y. 2021).

[111] Ditech Fin. LLC v. Naidu, 206 N.Y.S.3d 441, 457 (N.Y. Sup. Ct. 2023) (quoting Dubin v. United States, 599 U.S. 110, 120–21 (2023), that the United States Supreme Court has "long considered that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute."). However,

legislature intended retroactive application as an integral component for the full achievement of FAPA's fundamental purpose, and such intention is far from unclear.

The Putnam County Supreme Court, when applying the *Matter of Gleason* analysis, also argued that FAPA fails the last factor of the test because the amendment does not clarify what the law was always meant to do and say but rather changed the longstanding law and created new limits on when a cause of action to foreclose a mortgage accrues.[112] The court's analysis here has merit and identifies a consideration not raised by the other courts. The Senate Sponsor stated that the General Obligation Law ("GOL") Section 17-105, which was enacted in 1963 and was amended by FAPA, provided at its original enactment "the exclusive means by which parties to a mortgage may agree" to change the statute of limitations and that *Engel* distorts such intention by allowing voluntary discontinuance to affect the statute of limitations; FAPA thus serves to clarify and restore this original intention.[113] However, the Putnam County court noted that in practice, the state judiciary had consistently allowed tolling or resetting of the statute of limitations by a lender's unilateral act of revocation and "understood that nothing in GOL § 17-105 as enacted in 1963 precluded the cancelling or resetting of the statute of limitations . . . upon the lender's revocation of its election to accelerate the debt."[114] As a result, the court reasoned that FAPA does not merely "clarify" existing law but makes a "wholesale change" overriding decades of New York case precedent by, according to other parts of the language of the Memo in Support of Legislation itself, not merely clarifications but also "*changings* [sic] to the General Obligations Law to *create* clear limits on when a cause of action to foreclose a mortgage accrues."[115]

some may reasonably argue that the term "prevention," due to its forward-looking meaning, only applies to abuses in future actions.

[112] *Speller*, 197 N.Y.S.3d at *17. *See also supra* note 38.

[113] *See* S.B. S4573D, Sponsor Memo (2022).

[114] *Speller*, 197 N.Y.S.3d at *14.

[115] *Id.*

One may refute the Putnam County court's reasoning and argue that FAPA only clarifies existing rules. For example, one could simply argue that, as the legislature implies, for sixty years the entire judiciary of New York actually failed to understand that GOL Section 17-105, as enacted in 1963, always precluded the changing of the statute of limitations in a foreclosure action by a lender's unilateral act of revocation. Although it is the "province and duty of the judicial department to say what the law is,"[116] to pass the last factor of the *Matter of Gleason* test, the inquiry is whether the amended statute reaffirms a *legislative judgment* about what the law should be,[117] and it could be the case that courts have failed to understand such judgment for sixty years. Opponents of this view, on the other hand, may argue that the Court of Appeals, by repeatedly interpreting the statute in another way, fixed its meaning as definitely as if it had been so amended by the legislature,[118] but such an argument is weak given there is only one Court of Appeals ruling, namely *Engel*. Furthermore, any statutory amendment necessarily involves the "creation" of some kind of "changes" by the legislature on the statute's text and language, and the mere use of such dictions in the Sponsor Memo cannot lead directly to the conclusion that the content and nature of the law in question is being changed fundamentally. Thus, it is also sensible to say that FAPA merely clarifies the existing law.

Either way, FAPA should satisfy the *Matter of Gleason* test. It is a remedial legislation, and there is clear legislative intent that the law can be applied retroactively. The statutory language demonstrates a sense of urgency favoring retroactivity. Although it may not be clear whether FAPA clarifies or changes what the statute was always meant to say and do, this factor is ultimately "relevant" but not dispositive to determining the outcome of the test.[119] On balance, FAPA

[116] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

[117] *See supra* note 105.

[118] *See* Ruffolo v. Garbarini & Scher, P.C., 668 N.Y.S.2d 169, 172 (N.Y. App. Div. 1st Dep't 1998).

[119] Brothers v. Florence, 739 N.E.2d 733, 736–37 (N.Y. 2000).

satisfies the majority of the factors, and thus it should overcome the presumption against retroactivity.

B. Vested Rights and Interests in Relation to Judgments of Foreclosure and Sale

Although Section 10 allows application to any action where a final JFS has not been enforced, courts have applied FAPA in light of the facts and circumstances presented,[120] balancing the law's remedial intent against substantive rights that may be impaired. The courts have noted that a retroactive law is invalid when its application impairs rights vested under existing laws or valid contracts or when it creates a new obligation or attaches a new disability to transactions already past.[121] Yet, it seems unclear what events or court actions vest such rights and interests.

In *HSBC v. Besharat*, the Putnam County court denied retroactive application based on the ruling by the Court of Appeals in *Gilbert v. Ackerman*, that "[t]he right possessed by a person of *enforcing* his claim against another is property;"[122] it also relied on *Merz v. Seaman*, a case where the Appellate Division ruled that "applying retroactively a statute effective 'immediately' to dismiss an action viable at the time it was filed impairs vested rights and violates due process."[123] For foreclosure actions, enforcement of claims typically refers to "the procedure by which a creditor can forcibly enforce his civil law claim against a debtor" after a judgment or order issued

[120] *See* MTGLQ Invs., L.P. v. Gross, 190 N.Y.S.3d 244, 249–50 (N.Y. Sup. Ct. 2023).

[121] *Id.* at 249.

[122] HSBC Bank USA, N.A. v. Besharat, 195 N.Y.S.3d 380, 386 (N.Y. Sup. Ct. 2023) (citing to Gilbert v. Ackerman, 159 N.Y. 118, 124 (N.Y. 1899)) (emphasis added).

[123] *Id.* (citing to Merz v. Seaman, 697 N.Y.S.2d 290, 293 (N.Y. Sup. Ct. App. Div. 2d Dep't 1999)).

by the court.[124] The *Gilbert* ruling seems to be in line with some present court rulings on FAPA which state that once a JFS is *issued*, property rights are vested in the mortgagee and cannot be impaired by retroactive application. However, most existing rulings on FAPA go against the *Merz* holding, since they have allowed FAPA's retroactive application and rendered past actions, although valid under *Engel* and before FAPA, time-barred. This inconsistency can be resolved as the Putnam County court's reliance on *Merz* in the application of FAPA appears misguided.

It should be noted that *Merz* preceded *Matter of Gleason*. Before *Matter of Gleason*, when deciding whether to grant retroactive application of a new law, for instance, amending the statute of limitations on nonmedical malpractice actions, the Appellate Division did not consider the factors in the *Matter of Gleason* test and determined that as long as the action was timely commenced under the prior law, the new law can never be retroactively applied and render it time-barred since it would impair "vested rights."[125] After *Matter of Gleason* and as applied to FAPA, however, such a ruling would unreasonably and significantly harm FAPA's purpose. Under *Matter of Gleason*, courts determine retroactive application by balancing the legislative intent and potential harms, instead of using the bright-line rule in *Merz*. If *Merz* is applied to FAPA, the scenarios where the law could effectuate its purpose would become extremely limited: as seen in the existing case law, all of these cases are dealing with an action commenced before FAPA. Given that FAPA passes the *Matter of Gleason* test, I have already concluded that it may be retroactively applied, so any right that may have been vested by mortgagee's commencement of action under prior law

[124] Editorial Team Germany, *What is an Enforcement?*, RIVERTY (May 1, 2023) https://www.riverty.com/en/financial-academy/financial-guide/what-is-an-enforcement/ [https://perma.cc/8M36-5JUH].

[125] *See* Ruffolo v. Garbarini & Scher, P.C., 668 N.Y.S.2d 169, 172 (N.Y. App. Div. 1st Dep't 1998). This is also the case that the court in *Merz* primarily relied on in its reasoning.

should not impede retroactive application. Thus, the outdated *Merz* ruling should no longer be applied to FAPA.

Per *Gilbert* and existing cases on FAPA, the majority rule is that a JFS could vest property rights. The next question becomes: what kind of JFS? The courts have taken different approaches. In *Leonardo*, the court ruled that once a sale is *scheduled* after a final JFS, it is deemed "enforced" and thus FAPA would not apply, since the judgment has given the mortgagee property rights that cannot be impaired.[126] This rationale attempts to work within FAPA's framework instead of bypassing the language of Section 10 altogether. In *Gross*, on the other hand, a summary JFS issued before FAPA was sufficient to establish such rights, and retroactive application was not allowed no matter if the judgment was deemed "enforced" or not.[127] In comparison, *Leonardo*'s ruling here appears unnecessarily narrow; what if the judgment is issued but the sale not "scheduled," even if, according to the court, such judgment vests property rights that cannot be impaired? The court would then, according to its own rationale, still impede retroactive application. Whether the sale is "scheduled" or not should thus be irrelevant in the court's analysis.

Both *Leonardo* and *Gross* agree that a JFS, issued before FAPA, would vest property rights, but without providing further qualifications. In *Miele*, however, the court noted that "litigants do not obtain any vested property rights in the orders or judgments of the court *during the period they are subject to review by a higher court*,"[128] and a summary JFS issued *after* the effective date of FAPA was not enough to establish such rights. These further specifications seem to be in line with the state common law. In *Hodes v. Axelrod*, for example, the Court of Appeals has explained the traditional Vested Rights Doctrine, that a "judgment, after it becomes final, may not be affected by *subsequent* legislation," and

[126] U.S. Bank Tr., N.A. v. Leonardo, 192 N.Y.S.3d 472, 476.

[127] MTGLQ Invs., L.P. v. Gross, 190 N.Y.S.3d 244, 250 (N.Y. Sup. Ct. 2023).

[128] U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 669 (N.Y. Sup. Ct. 2023) (emphasis added).

"[o]nce *all avenues of appeal* have been exhausted . . . a judgment becomes an inviolable property right" that may not be abridged by subsequent legislation.[129] Thus, a baseline rule we may have here is that JFS creates vested rights if issued before the enactment of FAPA and with the right to appeal no longer existent. This rule can be further supported by the state civil procedure rule that "[a]fter entry of a final judgment, a motion for leave to renew . . . based upon a 'change in the law that would change the prior determination' must be made . . . before the time to appeal the final judgment has expired."[130] In addition, the Separation of Powers Doctrine, which "precludes the legislature from undertaking to re-adjudicate controversies that have been limited in courts and resolved by final judicial judgment," also echoes this principle.[131] But what if there is still right to appeal? Would such judgment create vested property interests?

Further scrutiny on the evolution of the Vested Rights Doctrine shows that its rigidness has eroded. The Court of Appeals noted in *Hodes* that the courts have over time recognized that the doctrine is "conclusory, and indeed a fiction that 'hides many unmentioned considerations of fairness to the parties, reliance on pre-existing law, the extent of retroactivity and the nature of the public interest to be served by the law.'"[132] Modern cases "reflect a less rigid view" and "more candid consideration—on a case-by-case basis—of the various policy considerations upon which the constitutionality of retroactive legislation depends."[133] This more balanced view is applied as a "rational basis" test that is very similar to the rational basis test used by the courts to

[129] Hodes v. Axelrod, 515 N.E.2d 612, 615 (1987) (internal quotation marks omitted) (quoting N.Y. Stat. Law § 58 (MCKINNEY 2024)) (emphasis added).

[130] Matter of Eagle Ins. Co. v. Persaud, 1 A.D.3d 356, 357 (quoting N.Y. C.P.L.R. 2221(e)(2) (MCKINNEY 1999)).

[131] *See* Wilmington Tr., N.A. v. Gawlowski, 201 N.Y.S.3d 605, 611–12 (N.Y. Sup. Ct. 2023).

[132] *Hodes*, 515 N.E.2d at 615 (citing Chrysler Props., Inc. v. Morris, 245 N.E.2d 395, 397 (N.Y. 1969)).

[133] *Id.*

analyze constitutional due process violation by retroactive laws.[134] Interestingly, recent cases still employ the traditional rigid doctrine if the subject judgment is not reviewable by a higher court.[135] But for judgments issued before FAPA that can still be reviewed by a higher court, this Note recommends the courts to employ the "rational basis" test to reflect the more sensible modern views instead of giving a blanket conclusion, as the courts did in *Leonardo*, *Gross*, and *Miele*, that mortgagees certainly do or do not obtain vested property right through a JFS.[136]

Finally, it should be noted that mortgagees may argue for vested rights obtained not through judgments, but through other court decisions such as a prior denial of a motion, brought by the mortgagor, to dismiss the foreclosure action. Such arguments would most likely fail. In these scenarios, no JFS has been enforced, thus retroactive application would not violate the language of FAPA Section 10. In addition, obtaining a judgment and successfully defending against a motion to dismiss are procedurally different. The former is an adjudication on the merits, whereas the latter is not a final order but merely allows the mortgagee to keep pursuing its claim.[137] Thus, unlike a JFS, a denial of a motion to dismiss does not grant a vested property right. In *Miele*, the mortgagor also filed a motion to dismiss, claiming that the foreclosure action was time-barred because the mortgagee's prior voluntary discontinuance did not toll the statute of

[134] *See* Chrysler Props., Inc. v. Morris, 245 N.E.2d 395, 397 (N.Y. 1969).

[135] *See Gawlowski*, 201 N.Y.S.3d at 610; *see also* Hodes, 515 N.E.2d at 615–16 (noting that although the Court of Appeals affirmed the "due process" rational basis balancing test again in 1987, it also affirmatively found that there exists a "final judgment" exception to the doctrine wherein *res judicata* was acknowledged to be a bar to the application of a legislative retroactivity clause).

[136] *See* U.S. Bank Tr., N.A. v. Leonardo, 192 N.Y.S.3d 472, 476–77; MTGLQ Invs., L.P. v. Gross, 190 N.Y.S.3d 244, 250–51 (N.Y. Sup. Ct. 2023); U.S. Bank Tr., N.A. v. Miele, 197 N.Y.S.3d 656, 671 (N.Y. Sup. Ct. 2023).

[137] *See* Smith v. City of New York, 130 F. Supp. 3d 819, 828 (S.D.N.Y. 2015), *aff'd*, 664 F. App'x 45 (2d Cir. 2016). *See also* Bernard v. Cnty. of Suffolk, 356 F.3d 495, 501 (2d Cir. 2004).

limitations.[138] Notwithstanding the court's prior denial, before FAPA, of the mortgagor's motion to dismiss based on *Engel*, the court still retroactively applied FAPA, inherently suggesting that in a foreclosure action, the successful defense against a motion to dismiss does not vest any property right.[139] Other decisions in the litigation process, other than a JFS, may also warrant discussion on whether they would create vested rights in the mortgagees, and this Note leaves such inquiry to future research.

In summary, this sub-section has attempted to resolve the conflicts and vagueness of existing case law on FAPA by determining that: a final JFS not reviewable by a higher court vests within the mortgagee property rights that cannot be violated by retroactive application; final judgments that may still be reviewed and appealed may vest property rights, but a case-by-case rational basis test should be employed to determine whether retroactive application is proper; a right of action that was viable at the time it was filed, without judgment, does not impede retroactive action; finally, court decisions other than judgments, such as a prior denial of a motion to dismiss, would most likely not vest rights and hinder FAPA's retroactive application.

C. Considerations on Contract Right Violations

Finally, as noted earlier, the vested right doctrine is closely associated with the question of FAPA's constitutionality, since the "vested right" here often refers to property and due process rights of the mortgagee. As for contract right violations under the Constitution, the lower courts have been fairly clear that such rights may be violated by FAPA's retroactive application only if it would substantially impair express contract terms within the mortgage agreement.[140] It is indeed well settled that "where no contractual agreement concerning the terms is

[138] *Miele*, 197 N.Y.S.3d at 661.

[139] *Id.* at 671.

[140] *See supra* Section II.C.iii.

changed by the legislation, the legislation cannot violate the Contracts Clause."[141] The majority of existing FAPA cases involve mortgage agreements or notes in which there was no express language allowing the mortgagee to "revoke acceleration," so FAPA's retroactive application would not violate the Contracts Clause.[142]

Even when there is an impairment of express contract terms, retroactive application may still be constitutional if a state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose."[143] To determine whether there is such a rational compromise between impairment of individual rights and advancing public welfare, the Second Circuit summarized, in *Melendez v. City of New York*, five relevant factors: first, the State's police power to protect the vital interests of the community is properly invoked; second, the challenged legislation protected "a basic interest of society" and "was not for the mere advantage of particular individuals;" third, the relief afforded was "appropriate" to the emergency; fourth, the relief was granted "upon reasonable conditions;" and fifth, the law was "temporary in operation."[144] FAPA's retroactive application, however, fails this test.

Secondary sources have argued that FAPA fails the first and second factor, that FAPA "was not passed to address a broad, generalized economic or social problem," but rather "passed in direct response to overrule a decision by a separate branch of government;" it does not protect a basic societal interest and benefits only a "favored group—seriously delinquent borrowers . . . —to the detriment of lenders, who have advanced substantial sums of money, not just the loan,

[141] *See* Consumers Union of U.S., Inc. v. State, 840 N.E.2d 68, 86 (N.Y. 2005).

[142] *See, e.g.*, Ditech Fin. LLC v. Naidu, 206 N.Y.S.3d 441, 451 (N.Y. Sup. Ct. 2023).

[143] Sveen v. Melin, 584 U.S. 811, 819 (2018).

[144] Melendez v. City of New York, 16 F.4th 992, 1023 (2d Cir. 2021).

but taxes, insurance and other costs to maintain the property, which benefit borrowers."[145]

These arguments appear weak in light of the Sponsor Memo. First of all, addressing a broad economic or social problem is not mutually exclusive with overriding a court decision; although FAPA aimed to "rectify erroneous judicial interpretations thereof," doing so was an effective way for the legislature to achieve the overarching goal of the statute: to resolve the "ongoing problem with abuses of the judicial foreclosure process" and eliminate the "unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers," a broad economic and social problem caused by "abusive and unlawful litigation tactics that have been employed by foreclosure plaintiffs."[146] In addition, the "everyday New Yorkers," which may refer to the vast number of citizens who obtained mortgage loans, can hardly qualify as "particular individuals" in the second factor; in 2021 alone, the total number of residential real property mortgages originated in New York was 448,702.[147] It cannot thus be said that the enactment of FAPA was for the mere advantage of "particular" individuals.

Nonetheless, even though the first two factors may be satisfied, the other three are clearly not. As noted in *Speller*, when there are express terms on lender's right of revocation in the mortgage agreement, "FAPA would erect a limitations barrier depriving lenders of a means to enforce contractual claims that were valid and timely under the law in force when they were interposed, thereby working a severe, permanent

[145] Diana M. Eng & Andrea M. Roberts, *Can the Foreclosure Abuse Prevention Act Survive a Constitutional Challenge?* N.Y.L.J. (Jan. 6, 2023), https://www.blankrome.com/publications/can-foreclosure-abuse-prevention-act-survive-constitutional-challenge [https://perma.cc/UAS9-7JDG].

[146] S.B. S4573D, Sponsor Memo (2022).

[147] *Total Number of Residential Real Property Mortgages Originated in New York State in 2022*, N.Y. DEP'T OF FIN. SERVS., https://www.dfs.ny.gov/apps_and_licensing/mortgage_companies/rrpm_originated_nys [https://perma.cc/2TPL-DASR] (last visited Mar. 4, 2025).

and irrevocable destruction of contractual rights."[148] "Such drastic relief cannot be deemed 'appropriate' to the circumstances that occasioned FAPA's enactment (Factor 3), it was certainly not granted 'upon reasonable conditions' (Factor 4), neither is it 'temporary in operation' (Factor 5)."[149] FAPA's retroactive application would thus fail this five-factor balancing test and should always be deemed unconstitutional if it substantially impairs express contract terms; the *Melendez* exception should not apply to FAPA.

IV. CONCLUSION

In this Note, I have summarized the existing case law on FAPA's retroactive application and identified the major conflicts and vagueness among the state lower courts' opinions. I have resolved these issues by pointing out flaws in a few court reasonings in light of the state common law on statutory retroactivity, as well as by filling in the gaps in the holdings of current cases and integrating them into more coherent rules. Having clearer standards on FAPA's retroactivity is significant for a few reasons. First, without any opinion from the Court of Appeals at the moment, it would help courts and parties resolve their disputes more efficiently in the future. Second, it would help clarify the New York State rules on many issues regarding statutory retroactivity in general. And finally, a thorough analysis of the issues could help elucidate the real impact of this new and controversial legislation on borrowers and lenders in New York.

Outside of the courts, the reaction of the mortgage industry to FAPA's enactment has been mixed. Proponents have expressed that lenders in New York "have a longstanding reputation for marginalizing the statute of limitations through stopping and restarting actions that can leave homeowners in foreclosure for a decade or more," and that

[148] U.S. Bank Nat'l Ass'n v. Speller, 197 N.Y.S.3d 925 (Table), at *21 (N.Y. Sup. Ct. Oct. 31, 2023).

[149] *Id.*

such practices "disproportionately harm communities of color."[150] Some described *Engel* as "aberrational"[151] and felt relieved that FAPA would end the "chaos" brought by *Engel*, preventing "long-dead foreclosure cases" to be exhumed.[152] Opponents of the bill, on the other hand, argued that FAPA would "severely limit the mortgage holders' right to reach the merits of a foreclosure claim and encourages borrowers to delay foreclosure proceedings and ignore loss mitigation and debt restructuring efforts made by lenders."[153] They predict that with FAPA, many lenders will "stop originating loans in New York," and even if they do, they would revise income thresholds upward, which would harm low-income borrowers and first-time homeowners.[154] Many also worry that although "FAPA presently pertains only to New York state, its enactment may pave the way for similar legislation elsewhere."[155]

With FAPA having been in effect for only about two years, much is yet to be seen regarding FAPA's jurisprudence and whether the impacts that the proponents and opponents have discussed above will realize. As such, FAPA is on its way to become a ripe field for legal scholars and social scientists to explore, and this Note hopes to leave some groundwork for such future endeavors.

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[150] *See* Steve Goode, *N.Y. Senate Passes Foreclosure Abuse Prevention Bill*, NAT'L MORTG. PRO. (May 4, 2022), https://nationalmortgageprofessional.com/news/ny-senate-passes-foreclosure-abuse-prevention-bill [https://perma.cc/N4S2-UT8J].

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Steve Goode, *New York Bill Could Chill Lending*, NAT'L MORTG. PRO. (Mar. 28, 2022),

https://nationalmortgageprofessional.com/news/new-york-bill-could-chill-lending [https://perma.cc/2CCZ-QSFH].

[155] Lucas Sambrook, *What NY's Foreclosure Abuse Prevention Act Means for the Mortgage Industry*, AM. ASS'N OF PRIV. LENDERS (Feb. 7, 2023), https://aaplonline.com/articles/compliance/what-nys-foreclosure-abuse-prevention-act-means-for-the-mortgage-industry/ [https://perma.cc/W6AH-NYY4].