



*Queens County Women's Bar Association's Continuing Legal Education Committee Presents:*

# Engel is Dead: Overview & Discussion of the Foreclosure Abuse Prevention Act

Panelists:

Hon. Cassandra Johnson

Mark Anderson, Esq.

Daniel S. Gordon, Esq.

Erick Vallely, Esq.

# Introductions

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# Precursor: Engel and its Predecessors

Freedom Mtge. Corp v Engel, 37 NY3d 1 (2021):

- Resolved a split between the First and Second Depts re: whether a default letter accelerates a mortgage debt and clarifies what conduct sufficiently accelerates a mortgage debt and revokes acceleration
  - A default letter stating that the lender “will” accelerate the debt referred to a future event and thus didn’t accelerate the debt
- Where an acceleration of a loan occurred by virtue of the filing of a complaint, the noteholder’s voluntary discontinuance of that action within 6 years of the filing served to stop the limitations clock and constituted a revocation of the acceleration
- FAPA, as noted by the Legislature, is meant to “expressly overrule Engel”

# Justification for Bill

- Fix the ongoing problems
- Clarify and amend Legislative intent of existing law
- Emphasize strict compliance with remedial statuses and prevent manipulation of long-standing Statute of Limitations law
- Rectify erroneous judicial interpretations
- Assure equal application of the law to all litigations, not just banks
- “Thwart and eliminate abusive and unlawful litigation tactics that have been employed by litigation plaintiffs”
- Stop perversion of long-standing case law

# RPAPL 1301

- Existing Statute:
  - “While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.”
- Existing Case Law:
  - Court narrowly interpreted and stated that only when simultaneous actions to collect and to foreclose would require leave of court. Prior action is “de facto discontinued” or “effectively abandoned” upon filing new action.
    - *U.S. Bank N.A. v. Chait* (First Department)
    - *HSBC Bank USA v. Kading* (Second Department)
    - *U.S. Bank Trust, N.A. v. Biggs*
- New: Strictly applies to 1301: If a prior action remains pending, then bank must seek leave of court in the old case to commence new case. The motion is a condition precedent and is cause for dismissal of new case if not followed. 1301 cannot be used to stay or toll the SOL.
- Application: Hypothetical

# GOL 17-105

- Existing Case Law: By discontinuing a foreclosure action, a mortgage acceleration is revoked and the statute of limitations (if done so before the SOL expires) is reset.
- Existing Case Law: Engel and its Progeny
- New: In order to revoke an acceleration and reset the statute of limitations, the court must follow this statute and this statute alone. The revocation cannot be unilateral; both parties (bank and borrower) must sign a stipulation agreeing to revoke, waive, toll, cancel, revive or reset the accrual of the SOL. Banks can no longer rely on voluntary discontinuances or stipulations of discontinuances that do not purport to revoke the acceleration;
- East Fork Funding LLC v. U.S. Bank, N.A. 20 CV 3404 (ABD)(RML)(FAPA constitutional)
- *Federal Natl. Mtge. Assn v Jeanty*, 39 NY3d 951 951 [2022]
- *Aspen Props. Group, LLC v Santoro*, 77 Misc 3d 1227(A), 2023 WL 328625 [Suffolk Ct., January 19, 2023]

# CPLR 3217

- Existing Case Law: Engel
- New: Must use GOL 17-105 to reset SOL and “de accelerate”. Piggy back on CPLR 203 and GOL 17-105
- Solution
- Criticism

# CPLR 203(H)

- Existing Law: One can send a revocation letter to reset the SOL
- New: Same as above, but used as further justification for Engel being overruled as violative of CPLR 201 and CPLR 203. As the legislature said: just as a personal injury plaintiff cannot “un-injure” themselves and then re-injure themselves, a bank cannot do so either once they have been injured and accelerated their mortgage and the accrual of the SOL has begun. No revocation letters will be allowed.
- Cases
- Application: Hypothetical



# CPLR 205(C)

- Existing Case Law: CPLR 205 applies to foreclosure cases
- New: CPLR 205 no longer applies to foreclosure action. Now there is a specific savings statute for foreclosure. See below for details. Specific new law carved out to prevent “extraordinary abuse and judicial misinterpretation” of CPLR 205 savings statute.
- Cases:
  - *Wells Fargo v. Eitani*
  - *Bank of New York v. Slavin*
- Application: Hypothetical

# CPLR 205-A

- Existing Case Law
- New: Cases dismissed for “abandonment” cannot be saved by the savings statute in a subsequent action
  - This includes cases dismissed under: CPLR 3215(c), 3216, CPLR 3404, violation of court rules or individual part rules, failure to comply with court scheduling orders, defaults due to nonappearance, or failure to timely submit any order or judgment, REGARDLESS OF SPECIFICITY, or lack thereof, utilized in the dismissal order.
  - No longer need to show a “pattern of neglect” which the legislature viewed as a legal fiction. No detail needed.
  - Even if able to utilize the savings statute, it must be utilized by the “original” plaintiff. So, if the note is assigned, then the assignee cannot use CPLR 205. If there is a trust and the trustee merely changes, then its ok.
  - Can only benefit from savings statute once
    - Also, if you weren’t in the prior case, they can’t use 205 against you.
- Solution
- Criticism
  - Relation back
- 1304: US Bank v. Pierre
- Southern District Case on “Original Plaintiff”

# CPLR 213(4)

- Existing Case Law: If a bank didn't have standing in the prior case, regardless of default, the mortgage was not accelerated. Previously, a bank could argue that it previously did not have standing when it commenced the prior action. The fact of whether a plaintiff had standing in the prior action would then be litigated as part of the motion to dismiss.
- New: Unless there was a litigated case where there was a "Express judicial determination" (not on default) of no standing that was opposed, then a prior ruling of no standing does not prevent the mortgage from being accelerated. It is now the responsibility of the bank to prove they DID not have standing in the prior case.
- Criticism: Previously, plaintiffs were allowed to argue that the prior plaintiff did not have standing to commence the prior action even where there was no determination of standing in the prior action. Thus, standing in an old action would be litigated in the current action to determine if the prior plaintiff had standing. It would put defendants in the position having to prove that a prior plaintiff actually had standing and validly accelerated the debt.

# CPLR 213(4)

*continued*

- Solution: Under FAPA only if there is an expressed judicial determination made upon a timely interposed defense that the debt was not validly accelerated can such determination be used by the plaintiff to argue that a prior action did not validly accelerate the debt. In the context of a foreclosure action this will happen a vast majority of the time in the context of a prior determination that the prior plaintiff did not have standing and thus the debt was not accelerated by commencement of the first action.
- *Wilmington Savings Fund Society v. Madden*, 2023 NY Slip Op 23044, 2023 WL 1980134 (Putnam Ct, February 10, 2023): A determination in a prior action that the plaintiff lacked standing leads is an “expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated,” and such a determination can be used by a plaintiff to find that there was no acceleration and thus overcome statute of limitations defense.

# CPLR 213(4)

*continued*

- *GMAT Legal Title Trust 2014-1 v. Kator*, 213 AD3d 915 [2d Dept 2023]: Plaintiff estopped from arguing that the debt was not validly accelerated by the commencement of the prior action based on the prior plaintiff's lack of standing because the prior action was voluntarily discontinued and was not dismissed "based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated."
- *Reinman v. Deutsche Bank National Trust Co.*, NY Slip Op 01813, 2023 WL 2778352 [2d Dept 2023]: Debt was not accelerated by commencement of prior foreclosure action as the prior plaintiff was found to have lacked standing in that action and, thus, did not have authority to accelerate debt at that time.

# Effective Date & Constitutional Challenges

- Effective: Immediately, and applies to all cases where property is not sold
  - Taking
  - Bill of Attainder
  - Due Process
  - Contract Clause
  - Recent (bizarre) cases saying FAPA can't be retroactive
    1. [https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Rb9E\\_PLUS\\_TFS4Zx3zccQk1A\\_PLUS\\_PQ==&system=prod](https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Rb9E_PLUS_TFS4Zx3zccQk1A_PLUS_PQ==&system=prod)
    2. <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=1XSyaVLWLYyXk3ZQciMa8A==>

# Practical Implications & Ethical Issues

- Anticipated motions:
  - Motion to review
  - Motion to amend answer to include SOL
  - Discovery on the standing issue
  - Motion to stay decision on any pending motions  
pending motion to renew
  - Motions to stay pending AG and Appellate Division  
Decisions
- Ethical Issues
  - Is it malpractice if a case you are handling becomes  
time barred because of statute?
    - Need case law
  - What if you didn't have an SOL argument before but  
now you do? Waived?
- Settlement:
  - Extra lines that will be included after settlements
- Loss mit option changes
- Reverse Mortgages
- Bankruptcy Context

## Updates:

- AG Office
- Appellate Division
- Court of Appeals



Kessler and 1304

*with Special Guest*

Charlie Wallshein

- Decision
- New Legislation

# Q & A

please submit questions in the chat



**EDWINA G. RICHARDSON-MENDELSON**

Deputy Chief Administrative Judge  
Office for Justice Initiatives  
New York State Unified Court System

To: Hon. Norman St. George  
Hon. Deborah Kaplan

From: Hon. Edwina G. Richardson-Mendelson

Date: January 9, 2023

Re: Foreclosure Abuse Prevention Act

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On December 30, 2022, Governor Hochul signed into law the Foreclosure Abuse Prevention Act (“Act”), which in part is a direct response to the Court of Appeals’ decision in *Freedom Mtge. Corp v Engel*, 37 NY3d 1 (2021). In *Engel*, the Court held that where an acceleration of a loan occurred by virtue of the filing of a complaint, the noteholder’s voluntary discontinuance of that action within six years of the filing served to stop the limitations clock and constituted a revocation of the acceleration. The Foreclosure Abuse Prevention Act, as noted by the Legislature, is meant to “expressly overrule Engel.”

The text of the Act can be found [here](#). The Act takes effect immediately and applies to all foreclosure actions (both residential and commercial) in which a final judgment of foreclosure and sale has not been enforced. The relevant sections are summarized below:

Section 2 amends RPAPL 1301(3) and codifies RPAPL 1301(4). Collectively, these provisions provide that:

- No new action to recover any part of a mortgage debt can be brought while another action is pending or after final judgment without leave of the court. Compliance with the leave of court requirement is a condition precedent to commencing a new action. The failure to obtain leave of court is both a defense to the new action and grounds for dismissal of the former action.
- If a foreclosure action is barred by the statute of limitations, no new action to recover any part of the mortgage debt can be commenced.
- No party may unilaterally waive the statute of limitations or stipulate to extend time to commence an action.

Section 3 (see General Obligations Law 17-105(4) and 17-104(5)) and Section 4 (see CPLR 203(h)) clarify that a party to a foreclosure action cannot unilaterally postpone, reset, or toll the statute of limitations.

Section 6 codifies CPLR 205-a, which provides that a timely commenced action that is terminated by a manner other than for a reason set forth below can be recommenced within 6

months only if the statute of limitations hasn't expired and the defendant is served with a new complaint within 6 months:

- Voluntary discontinuance
- Lack of personal jurisdiction
- Dismissal of Complaint due to neglect under CPLR 3126, 3215, 3216 and 3404
- Violation of individual court rule or part rule
- Failure to comply with court scheduling orders
- Default due to nonappearance at a conference
- Failure to timely submit an order or judgment
- Final judgment on the merits

CPLR 205-a also provides that a successor in interest or assignee of the original plaintiff is not entitled to a six-month extension unless pleading and proving that such assignee is acting on behalf of the original plaintiff.

Section 7 codifies CPLR 213(a) and CPLR 213(b). Collectively, these provisions provide that:

- If a defendant raises a statute of limitations defense based on acceleration of the debt by commencement of a prior action, plaintiff is estopped from arguing that there was not a valid acceleration of the debt unless a court has determined the prior action was not a valid acceleration.
- In a quiet title action (see RPAPL 1501(4)), a defendant is estopped from asserting that a prior action did not trigger the statute of limitations unless a court determined that the debt was not validly accelerated in the prior action.

Section 8 codifies CPLR 3217(e) which provides that the voluntary discontinuance of an action is not a deceleration because it does not waive, postpone, cancel, or reset the statute of limitations.

The Office for Justice Initiatives will be collaborating with Counsel's Office, judges, and court staff to develop best practices, as needed, to ensure compliance with the Act. In the interim, questions and comments may be directed to Steven Helfont at [shelfont@nycourts.gov](mailto:shelfont@nycourts.gov).

Please distribute this memorandum to all UCS personnel who work on foreclosure matters.

Sincerely yours,

***Edwina G. Richardson-Mendelson***

Deputy Chief Administrative Judge  
for Justice Initiatives

CC: Hon. Tamiko Amaker  
Nancy Barry, Esq.  
Justin Barry, Esq.  
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Rosemary Martinez-Borges, Esq.  
Steven Helfont, Esq.

# STATE OF NEW YORK

7737--B

Cal. No. 274

2021-2022 Regular Sessions

## IN ASSEMBLY

May 20, 2021

Introduced by M. of A. WEINSTEIN, ZINERMAN, SOLAGES, SEAWRIGHT, COLTON, SIMON, ZEBROWSKI, PRETLOW, BURDICK, BRONSON, DAVILA, ENGLEBRIGHT, DINOWITZ, GLICK, SAYEGH -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules -- ordered to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the real property actions and proceedings law, the general obligations law and the civil practice law and rules, in relation to the rights of parties involved in actions commenced upon real property related instruments

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "foreclosure abuse prevention act".

3 § 2. Subdivision 3 of section 1301 of the real property actions and  
4 proceedings law, as added by chapter 312 of the laws of 1962, is amended  
5 and a new subdivision 4 is added to read as follows:

6 3. While the action is pending or after final judgment for the plain-  
7 tiff therein, no other action shall be commenced or maintained to  
8 recover any part of the mortgage debt, including an action to foreclose  
9 the mortgage, without leave of the court in which the former action was  
10 brought. The procurement of such leave shall be a condition precedent to  
11 the commencement of such other action and the failure to procure such  
12 leave shall be a defense to such other action. For purposes of this  
13 subdivision, in the event such other action is commenced without leave  
14 of the court, the former action shall be deemed discontinued upon the  
15 commencement of the other action, unless prior to the entry of a final  
16 judgment in such other action, a defendant raises the failure to comply  
17 with this condition precedent therein, or seeks dismissal thereof based

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules. This subdivision shall not be treated as a stay or statutory prohibition for purposes of calculating the time within which an action shall be commenced and the claim interposed pursuant to sections two hundred four and two hundred thirteen of the civil practice law and rules.

4. If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations.

§ 3. Subdivisions 4 and 5 of section 17-105 of the general obligations law are amended to read as follows:

4. [~~Except as provided in subdivision five, no~~] An acknowledgment, waiver [~~or promise has any effect to~~], promise or agreement, express or implied in fact or in law, shall not, in form or effect, postpone, cancel, reset, toll, revive or otherwise extend the time limited for commencement of an action to foreclose [~~or~~] a mortgage for any greater time or in any other manner than that provided in this section, [~~nor~~] unless it is made as provided in this section.

5. This section does not change the requirements[~~7~~] or the effect with respect to the accrual of a cause of action, nor the time limited for commencement of an action[~~7-ef~~] based upon either:

a. a payment or part payment of the principal or interest secured by the mortgage, or

b. a stipulation made in an action or proceeding.

§ 4. Section 203 of the civil practice law and rules is amended by adding a new subdivision (h) to read as follows:

(h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

§ 5. Subdivision (c) of section 205 of the civil practice law and rules, as amended by chapter 216 of the laws of 1992, is amended to read as follows:

(c) Application. This section also applies to a proceeding brought under the workers' compensation law but shall not apply to any proceeding governed by section two hundred five-a of this article.

§ 6. The civil practice law and rules is amended by adding a new section 205-a to read as follows:

§ 205-a. Termination of certain actions related to real property. (a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the

1 original plaintiff, or, if the original plaintiff dies and the cause of  
2 action survives, his or her executor or administrator, may commence a  
3 new action upon the same transaction or occurrence or series of trans-  
4 actions or occurrences within six months following the termination,  
5 provided that the new action would have been timely commenced within the  
6 applicable limitations period prescribed by law at the time of the  
7 commencement of the prior action and that service upon the original  
8 defendant is completed within such six-month period. For purposes of  
9 this subdivision:

10 1. a successor in interest or an assignee of the original plaintiff  
11 shall not be permitted to commence the new action, unless pleading and  
12 proving that such assignee is acting on behalf of the original plain-  
13 tiff; and

14 2. in no event shall the original plaintiff receive more than one  
15 six-month extension.

16 (b) Where the defendant has served an answer and the action upon an  
17 instrument described under subdivision four of section two hundred thir-  
18 teen of this article is terminated in any manner, and a new action upon  
19 the same transaction or occurrence or series of transactions or occur-  
20 rences is commenced by the original plaintiff, or a successor in inter-  
21 est or assignee of the original plaintiff, the assertion of any cause of  
22 action or defense by the defendant in the new action shall be timely if  
23 such cause of action or defense was timely asserted in the prior action.

24 § 7. Subdivision 4 of section 213 of the civil practice law and rules  
25 is amended by adding two new paragraphs (a) and (b) to read as follows:

26 (a) In any action on an instrument described under this subdivision,  
27 if the statute of limitations is raised as a defense, and if that  
28 defense is based on a claim that the instrument at issue was accelerated  
29 prior to, or by way of commencement of a prior action, a plaintiff shall  
30 be estopped from asserting that the instrument was not validly acceler-  
31 ated, unless the prior action was dismissed based on an expressed judi-  
32 cial determination, made upon a timely interposed defense, that the  
33 instrument was not validly accelerated.

34 (b) In any action seeking cancellation and discharge of record of an  
35 instrument described under subdivision four of section fifteen hundred  
36 one of the real property actions and proceedings law, a defendant shall  
37 be estopped from asserting that the period allowed by the applicable  
38 statute of limitation for the commencement of an action upon the instru-  
39 ment has not expired because the instrument was not validly accelerated  
40 prior to, or by way of commencement of a prior action, unless the prior  
41 action was dismissed based on an expressed judicial determination, made  
42 upon a timely interposed defense, that the instrument was not validly  
43 accelerated.

44 § 8. Rule 3217 of the civil practice law and rules is amended by  
45 adding a new subdivision (e) to read as follows:

46 (e) Effect of discontinuance upon certain instruments. In any action  
47 on an instrument described under subdivision four of section two hundred  
48 thirteen of this chapter, the voluntary discontinuance of such action,  
49 whether on motion, order, stipulation or by notice, shall not, in form  
50 or effect, waive, postpone, cancel, toll, extend, revive or reset the  
51 limitations period to commence an action and to interpose a claim,  
52 unless expressly prescribed by statute.

53 § 9. Severability clause. If any clause, sentence, paragraph, section  
54 or part of this act shall be adjudged by any court of competent juris-  
55 diction to be invalid, such judgment shall not affect, impair or invali-  
56 date the remainder thereof, but shall be confined in its operation to

1 the clause, sentence, paragraph, section or part thereof directly  
2 involved in the controversy in which such judgment shall have been  
3 rendered.

4 § 10. This act shall take effect immediately and shall apply to all  
5 actions commenced on an instrument described under subdivision four of  
6 section two hundred thirteen of the civil practice law and rules in  
7 which a final judgment of foreclosure and sale has not been enforced.