August 21, 2020

New York State Senate
August 21, 2020 Joint Public Hearing: The Unified Court System and COVID-19
Judiciary, Codes and Housing, Construction and Community Development Committees

My name is Jacob Inwald and I am the director of foreclosure prevention at Legal Services NYC. Thank you for the opportunity to testify about COVID-19 and the Court System, and more particularly, about the impact of the health and associated economic crisis on the judicial foreclosure process and homeowners. My testimony will touch on three broad topics:

1. Challenges as courts gradually resume foreclosure activity, both for parties who have representation and for the large numbers of NY's distressed homeowners who must fend for themselves without counsel, all of which are compounded by the many systemic issues we have been confronting in the judicial foreclosure process since long before the pandemic and by the digital divide that impairs access to justice for large swaths of the population when courts, of necessity, transition to virtual operations;

2. The acute need for a *permanent* funding source for the State's network of housing counseling agencies and legal services providers working with New York's distressed homeowners, the Home Owner Protection Program ("HOPP"), without which New York's consumer protections for homeowners are meaningless and the judicial foreclosure process cannot effectively function; and

3. Legislative proposals that would help homeowners and borrowers in their interactions with mortgage servicing companies and their law firms prosecuting foreclosures, which can divert cases from ripening into foreclosure cases, including a bill that would make it possible for homeowners to enforce New York Banking Law provisions and mortgage servicing regulations promulgated by the Department of Financial Services, which are strong on paper but lack teeth for lack of a private right of action.

As activity in foreclosure cases begins to resume, the courts have a unique opportunity to address the longstanding systemic issues that have plagued the courts' administration of residential foreclosure cases because of a seeming reluctance to adopt uniform statewide practices, which have been compounded by the judiciary's focus on expediting cases through the system, often at the expense of the time and care needed to allow for settlement negotiations or adjudication of highly complex cases. There are many challenges and concerns which are unique to the foreclosure docket, which we have brought to the attention of the Unified Court System with detailed recommendations of best practices that could ensure that the judicial process is administered efficiently and fairly, with consistency in all courts adjudicating foreclosure actions, while also protecting the health and safety of judges, court staff, litigants and counsel.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

Legal Services NYC
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Given the well-documented severity of the pandemic and associated economic impact on New York State's low- and moderate-income communities of color, which also bear the brunt of the economic dislocation associated with the pandemic as they did during the foreclosure crisis, it is especially important that the judiciary plan for resumption of foreclosure activity deliberately and with sensitivity to the particular needs of the litigants in these cases. The foreclosure process, regrettably, has often been exploited by predatory lenders, abusive mortgage servicers and gentrifying investors to extract wealth from New York's communities of color. In the present climate of greater consciousness of the racial and economic disparities that pervade our society it is crucial that the particular needs of the defendants in foreclosure cases—both those who are represented and those who are not—be considered as the courts resume activity in foreclosure actions. The courts must devise practices that minimize health risks while allowing for efficient and fair handling of these cases consistent with New York's strong consumer protections and policies designed to promote home-saving solutions as we anticipate a significant spike in foreclosure filings as moratoriums end and forbearance agreements expire in the coming months.

Legal Services NYC ("LSNYC") is the nation's largest provider of free civil legal services to the poor. For more than 50 years, LSNYC has provided expert legal assistance and advocacy to low-income residents of New York City. Each year, LSNYC's neighborhood offices across New York City serve tens of thousands of New Yorkers, including homeowners, tenants, the disabled, immigrants, the elderly, and children. LSNYC is also the oldest and largest provider of foreclosure prevention legal services in New York City. LSNYC's foreclosure prevention projects represent distressed homeowners and victims of predatory and discriminatory lending and abusive mortgage servicing in neighborhoods decimated by foreclosures across Brooklyn, Queens, Staten Island, and the Bronx, and it has provided such assistance to nearly 20,000 families since 2007.

**Resumption of Court Activity in Foreclosure Cases**

We remain in the early phases of resumption of activity in residential foreclosure cases, as there have been moratoriums on commencing and prosecuting foreclosures covering many categories of mortgage loans, but advocates have been proactive in urging the judiciary to take advantage of the opportunity the temporary suspension of activity presented to address longstanding systemic issues and challenges with the residential foreclosure process. A confusing patchwork of executive orders from the Governor's office, Administrative Orders and memos from the judiciary, and various federal and state moratoriums and forbearance plans have left both the judiciary and the bar with a lack of clarity, with the upshot being that foreclosure cases have been among the last categories of cases to resume activity. But that has been changing in recent weeks as the judiciary issued an Administrative Order permitting some activity to resume and as individual courts across the state have begun to conference cases and schedule appearances, with varying procedures, across the state. We are concerned that the recent

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

administrative order does not distinguish between cases in which both sides are represented by counsel and those in which the defendant is unrepresented, and we are now seeing some cases with unrepresented parties scheduled for virtual conferences, which is hugely problematic for many unrepresented parties. Furthermore, the order encourages virtual appearances where practicable, but offers no concrete guidance on that subject, even though previous orders permitted such virtual conferences only for cases in which all parties are represented.

What we know for certain is that the various moratoriums covering portions of the mortgage market have ended or are soon ending, as are the forbearance agreements that have delayed—but not averted—a looming foreclosure crisis. Loss of income, both from employment and from rental units on which homeowners often depend to sustain homeownership, is expected to drive a new wave of foreclosures, as will New Yorkers' property tax burdens and the sale of NYC tax liens to debt buyers who pursue foreclosures on those liens. All of this comes on top of a persistent and steady caseload of foreclosure cases, which have been on pause until recently, that have consistently dominated the dockets of New York's Supreme Courts across the state for more than ten years.

On June 24, 2020 NYC foreclosure prevention advocates wrote to Chief Administrative Judge Marks at length, detailing concerns and making numerous specific recommendations with respect to the three distinct phases of foreclosure actions—the mandatory settlement conference phase, the post-settlement conference litigation stage, and the post-judgment phases of foreclosure proceedings, including the auction process and surplus proceedings, a copy of which is attached to this testimony as Exhibit A. The focus of the concerns expressed in that letter is the need for improved communications from the courts; the need to connect homeowners at every stage of the proceedings with advocates who can advise and, where possible, assist homeowners in navigating the process; and the need to replicate virtually the clinics, friend of the court tables and other courthouse interventions that foreclosure prevention advocates have created in partnership with the judiciary, which have permitted unrepresented foreclosure defendants to connect with legal services providers to preserve their statutory rights to answer foreclosure complaints after their first settlement conference and which have allowed them to secure representation at those conferences.

Without the ability to connect with legal services providers, we are concerned that New York will revert to where things were before it implemented numerous consumer protections (such as pre-foreclosure notices and mandatory settlement conferences), when most homeowners defaulted and the courts merely rubber-stamped mass produced, robo-signed foreclosure complaints with no scrutiny to speak of. Also detailed in that letter to the court are recommendations for the conduct of motion practice and discovery in foreclosure actions, and much-needed changes to the arcane foreclosure auction process, which is plagued by a lack of transparency and lack of information provided to defendants about their rights in the process. In light of the pandemic, it is crucial that the courts devise ways to connect homeowners with legal services providers at these later stages of the proceedings as

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

well, so they can access advise and, where appropriate, representation, to preserve their rights and prevent avoidable loss of housing in the midst of a pandemic.

Additionally, we have expressed concerns about the impact of expanded virtual court activity on unrepresented parties, as we have learned from experience that the judiciary often mandates use of technology, such as electronic filing, without regard to the needs of unrepresented low-and-moderate income litigants lacking access to technology or internet access which decision-makers often take for granted. We detailed our concerns about the impact of virtual video conference court proceedings on unrepresented litigants, and made several recommendations about ameliorating the impact of virtual court activity on the unrepresented, in a letter to Judge Marks dated April 15, 2020, which is attached to this testimony as Exhibit B.[1]

We are hopeful that the judiciary will consider the concerns we highlighted—and the detailed recommendations we made—but so far, our offer to discuss the recommendations has not been taken up and we have been disappointed to see that the Unified Court System has not taken advantage of the opportunity to mandate certain baseline practices across the State, leaving considerable discretion to individual courts. So, for example, while guidance in a recent Administrative Order encourages virtual appearances to the extent practicable in cases where all parties are represented by counsel, a judge in Suffolk County is doing the exact opposite, requiring in-person court appearances in foreclosure cases with four cases conferenced in the courtroom simultaneously. With regard to the courts' expansion of e-filing to additional categories of cases in response to the pandemic, additionally, we were disappointed to see the judiciary issue guidance in an Administrative Order seemingly making such filings mandatory in cases where litigants were unrepresented, in violation of New York law *prohibiting* mandatory e-filing for unrepresented litigants unless such litigants expressly opt in to e-filing, which eventually was corrected by a subsequent administrative order whose promulgation was not widely publicized. But as mentioned above, the most recent guidance from the judiciary, while encouraging virtual appearances, makes not provision for accommodating the needs of unrepresented parties, for many of whom without access to the necessary broadband or technology, a virtual conference presents a barrier to access to the court.

**Precarious Funding for Foreclosure Prevention Advocates**

Many of you are familiar with the annual effort to prevent the defunding of New York's top-notch network of foreclosure prevention housing counselors and attorneys, whose sole source of funding is HOPP. Each year the HOPP network seeks a permanent source of funding in the state budget,

[1] Long before the pandemic, we expressed concerns about the judiciary's focus on expediting cases and reducing backlogs at the expense of a meaningful settlement conference process and careful adjudication of foreclosure cases in a letter dated November 19, 2019, which is attached as Exhibit C. That letter also highlighted many irregularities associated with the auction process for those cases that proceed to judgments of foreclosure and sale.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

which for several years had been funded by disappearing funds in the State's coffers derived from mortgage servicing settlements. But each year funding for HOPP does not appear in the Executive Budget, necessitating a frantic and resource-draining campaign to restore funding for the network before the expiration of the budget year on March 31. This annual exercise is damaging to the network, whose agencies must reduce intake when the loss of continued funding is a very real possibility, and who lose skilled advocates with the threat of defunding looming. While defunding was averted during the last budget campaign for the current budget year, only partial year grants have been awarded so far, agencies were left unfunded from April 1 to July 16, 2020, and the threat of a funding cut-off for this crucial part of the safety net standing between New York homeowners and homelessness during the pandemic still looms. More detail about the HOPP program and the crucial need for its funding is available in earlier testimony I provided about the program on February 5, 2020, which is attached as Exhibit D.

**Policy Proposals**

New York took an important step relatively soon after the onset of the pandemic to alleviate some of the problems that are associated with mortgage forbearance programs offered to struggling borrowers by enacting S08428/A10351 which, at least for mortgage loans subject to New York regulation, requires that options at the end of forbearance periods be offered so that a homeowner taking advantage of a moratorium on mortgage payments due to the crisis is not required to make a large "balloon payment" at the end of the forbearance period—which, as we know from similar Superstorm Sandy forbearance plans—can lead to a wave of new foreclosures. The legislation has important consumer protections, but without advocates, homeowners will be unaware of the protections this important law affords them and will be powerless to enforce them, reinforcing the need to maintain funding for the HOPP network.

Perhaps the single-most important pending legislation affecting mortgages and foreclosure is S.8789/A.10851. This bill would provide much needed protection for New York homeowners with mortgages experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity. The need for a private right of action to make these important consumer protections enforceable when mortgage servicers violate them was clear even before the pandemic unleashed a new wave of pain on New York's struggling homeowners, many of whom have yet to recover from the foreclosure crisis that precipitated the Great Recession. But with a complex web of relief available from different sources, the opportunities for abusive mortgage servicing harming consumers working with mortgage servicers will be more acute than ever, and this bill, as detailed in several memos regarding the bill attached as Exhibit E, will incentivize mortgage servicers to comply with these New York law protections and will bring New York law in line with analogous federal protections. The need for a

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

similar New York private right of action to enforce these rules is especially important now, with federal regulators abdicating enforcement of federal consumer protections.

For more information, please contact Jacob Inwald, at jinwald@lsnyc.org or 646-442-3634.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

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# EXHIBIT A TO TESTIMONY OF JACOB INWALD, AUGUST 21, 2020 JOINT HEARING: COVID-19 AND THE UNIFIED COURTS SYSTEM

**Legal Services NYC** | 40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 | Fax: 646-442-3601 | www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director | **Susan J. Kohlmann**, Board Chair

LSC

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June 24, 2020

Hon. Lawrence Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, New York 10004

Re: Resumption of Court Activity in Residential Foreclosure Cases in the New York City Supreme Courts

Dear Judge Marks:

On behalf of Legal Services NYC and its constituents Bronx Legal Services, Brooklyn Legal Services, Queens Legal Services and Staten Island Legal Services, as well as other legal services providers representing homeowners in foreclosure cases in New York City, including Brooklyn Bar Association Volunteer Lawyers Project, Brooklyn Legal Services Corp. A, CAMBA Legal Services, Inc., City Bar Justice Center, DC 37 Municipal Employees Legal Services, Grow Brooklyn, Inc., JASA/Legal Services for Elder Justice, The Legal Aid Society, Mobilization for Justice, New York Legal Assistance Group, Queens County Bar Association Volunteer Lawyers Project and Teamsters Local 237 Legal Services Plan, we write concerning the resumption of activity in residential foreclosure actions in the Supreme Courts in New York City.[1]

We believe that as activity in foreclosure cases begins to resume, the courts have a unique opportunity to address the longstanding systemic issues that we have discussed. We also wish to highlight challenges and concerns which are unique to the foreclosure docket, and to recommend certain practices which we believe will ensure that the judicial process is administered efficiently and fairly, with consistency in all courts adjudicating foreclosure actions, while also protecting the health and safety of judges, court staff, litigants and counsel.

Given the well-documented severity of the pandemic and associated economic impact on New York City's low- and moderate-income communities of color, which also bear the brunt of the economic dislocation associated with the pandemic as they did during the foreclosure crisis,

[1] We also write by way of follow-up to my November 19, 2019 letter and our January 9, 2020 meeting, during which we discussed general concerns about adjudication of foreclosure cases arising in the context of the judiciary's emphasis on expediting cases in order to meet "Standards and Goals" benchmarks. We also follow up on the April 15, 2020 letter from New Yorkers for Responsible Lending ("NYRL"), which expressed concerns about the expansion of virtual activity in the courts and the impact on unrepresented litigants without access to technology in all categories of cases.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

it is especially important that the judiciary plan for resumption of foreclosure activity deliberately and with sensitivity to the particular needs of the litigants in these cases.

While the foreclosure process, regrettably, has often been exploited by predatory lenders, abusive mortgage servicers and gentrifying investors to extract wealth from New York City's communities of color, we respectfully suggest that in the present climate of greater consciousness of the racial and economic disparities that pervade our society it is crucial that the particular needs of the defendants in foreclosure cases—both those who are represented and those who are not—be taken into account as the courts resume of activity in foreclosure actions. The courts must devise practices that minimize health risks while allowing for efficient and fair handling of these cases consistent with New York's strong consumer protections and policies designed to promote home-saving solutions as we anticipate a significant spike in foreclosure filings as moratoriums end and forbearance agreements expire in the coming months.

We outline below challenges, concerns and recommendations pertaining to the settlement conference phase of foreclosure actions, the litigation (discovery and motion practice) phases, and the final phases, post judgment of foreclosure and sale.

## 1. CPLR 3408 Settlement Conferences

As the courts plan for the resumption of settlement conferences, creative solutions that can replicate the clinics and other interventions that have successfully connected homeowners appearing at settlement conferences with legal services are needed. If that is not done, the gains New York has made in transforming the judicial foreclosure process from a "rubber-stamp" proceeding in which homeowners do not participate into one where homeowners are connected to legal services and where home-saving solutions are negotiated will be lost.

The COVID-19 pandemic, its devastating economic impact on homeowners and its disproportionate toll on black and brown families further underscores the importance of 3408 Conferences and the need for them to resume once state- and federally-imposed moratoriums expire. However, any plans to resume 3408 conferences must prioritize the health and safety of court personnel, litigants and their counsel over the pressure to return to operations at pre-COVID-19 norms and levels. Public health considerations demand that a virtual format, whether by videoconferencing platforms such as the Skype for Business presently in use, phone, or some other remote format be adopted by the courts. As organizations that provide legal assistance to homeowners across New York City, we urge the judiciary to consider and incorporate the following recommendations as it plans for remote 3408 conferences.

### Virtual Pre-Settlement Conferences

To ensure that homeowners, especially seniors and other vulnerable defendants, can effectively participate and access legal resources without being exposed to the risks that trips to the courthouse pose, we recommend that the courts schedule a virtual pre-settlement conference that requires the appearance only of defendants before a presiding referee prior to the scheduling of the first formal 3408 conference.

At the pre-settlement conference, the referee would explain to *pro se* defendants the purpose of the 3408 conferences, their rights during the process, including their statutory right to serve and file an answer 30 days after the first 3408 conference is held. The referee would also provide the homeowner with materials, including the *pro se* answer form and accompanying instructions, the Consumer Bill of Rights mandated by RPAPL § 1303 (3-a), and a list of names and contact information for legal service providers serving the county in which the court is situated.

**Virtual Clinics and Court Tabling**

An important function of the pre-settlement conference would be to connect *pro se* defendants to legal service providers early on, for advice, a discussion of their options, assistance with the *pro se* answer and possible limited scope representation during the settlement conferences. The court should allow legal service providers to be available to *pro se* defendants on a stand-by basis, either to participate in the pre-settlement conference or connect with the homeowner afterwards by conducting a virtual clinic following the conference.

**First 3408 Conference**

A 3408 conference would be scheduled within six weeks after the pre-settlement conference, again with legal service providers (on a rotating basis where conferences are held on multiple days of the week) available to staff a "virtual" table and appear as a friend of the court as needed. (If no answer had been served and filed, defendants' statutory right to serve and file an answer within thirty days of the first conference would run from the first formal settlement conference, and not from the pre-settlement conference appearance.)

**Conference Notices**

At present, the means by which defendants receive notice of 3408 conferences varies from one courthouse to another, with some even delegating to *plaintiffs* the statutory obligation to provide notice of the conferences to defendants. We recommend adoption of a uniform notice to advise all foreclosure defendants of the pre-settlement conference and the subsequent 3408 conferences. This notice should be written in plain English and translated into other languages used in the county in which the court is situated. The notice should explain the purpose of the pre-settlement conference and 3408 conferences, and should provide contact information for legal service providers serving the county. The notice should further inform the defendant about different options for participating in the conferences, whether by telephone, Skype for Business, or another videoconference platform. The notice should include a telephone number for the defendant to contact the court to arrange for the defendant's participation in conferences via one of the available technologies

Before 3408 conferences resume, a similar notice informing the defendant of options for participating virtually should be sent to defendants who were already participating in settlement conferences before March 16, 2020. To avoid confusion, these notices should be sent out by the

court, and this duty to provide defendants with notices of these conferences should never be delegated to plaintiffs' counsel.

**Access to the Courts**

If a *pro se* foreclosure defendant appears at the courthouse for a pre-settlement conference or 3408 conference that is scheduled to be conducted virtually, the court should not turn the defendant away or deem the defendant to be in default, but should provide the foreclosure defendant with a sanitized space and equipment, as well as masks and hand sanitizer, to enable the defendant safely to participate virtually by telephone or videoconference at the courthouse.

**No Defaults**

Considering the COVID-19 pandemic, the realities of the digital divide, and other challenges that make it difficult for many *pro se* defendants to participate remotely, no defendant should be defaulted for not appearing at the pre-settlement conference or the first 3408 conference. The court in these instances should send out follow-up letters with a phone number that the defendant can call to request a new date and arrange for virtual participation.

**Protecting Vulnerable Defendants**

If the court becomes aware that any foreclosure defendant is unable to represent his or her interest or is unable to participate meaningfully in 3408 conferences, such as because of a disability or a lack of capacity, the court should consider appropriate steps, which may include providing a reasonable accommodation, appointing guardian ad litem, contacting APS, and/or contacting one of the legal services providers for evaluation of such defendant's needs

**2. Post Settlement Conference Phase: Discovery and Motion Practice/IAS Parts**

The same concerns implicated in the 3408 conference phase of foreclosure cases are equally applicable after 3408 conferences are terminated and motion practice (and/or further conferences) commence in the IAS part, whether the foreclosure defendant is represented or not.

***Pro Se* Homeowners**

We are particularly concerned about *pro se* homeowners' ability to participate in their cases after conferences end. It is essential that they can access the court virtually for appearance dates on motions, that they be able to obtain timely service of court filings and notices, especially those in e-filed cases, and that they be permitted to participate in discovery, and that they be afforded the opportunity to connect with legal services providers before any return date or deadline.

Aside from the legal prohibitions on mandating e-filing for unrepresented parties (which are applicable to both the ECF e-filing system or any temporary systems such as EDDS), there are very real concerns about the impact on access to legal services if *pro se* litigants are required to use electronic filing, because many litigants are able to connect with legal service providers through legal clinics provided in courthouses or through referrals from clerks' offices and *pro se* desks. Even if *pro se* homeowners obtained attorney assistance to file a single motion electronically, they would likely not want to opt in to receiving all future court papers via electronic means, even though front-line courthouse staff might encourage them to do so.

However, requiring *pro se* litigants to appear in person to file their papers in the county clerk's office or to appear for a return date or calendar call while the health crisis persists would force these litigants to choose between protecting their health and preserving their legal rights—especially for those litigants who are elderly, have underlying health conditions, or care for others who may have compromised immune systems. Therefore, the following suggestions below together with notices sent by the Court to all *pro se* homeowners would help to alleviate these concerns and ensure that *pro se* homeowners are not adversely affected by the pandemic. These suggestions should be implemented on a city-wide basis to ensure consistency throughout the five boroughs.

**Adjournment of Motions and Discovery with *Pro Se* Defendants**

The Courts should continue to further adjourn all motions on the calendars with *pro se* defendants until safe in-person access to the courts and to legal services providers are once again fully available. Discovery deadlines for the unrepresented should also be adjourned indefinitely.

**No Defaults**

As with 3408 conferences, no *pro se* defendant should be defaulted for not appearing at a motion or conference appearance. The court in these instances should send out follow-up notices with a phone number where the defendant can request a new date and inform the court of the way they can participate.

**Referrals to Legal Services Providers**

To ensure that these protections are adequately in place, the courts should include in all notices sent out to *pro se* homeowners a list of legal service providers with their contact information so that they can be connected to an attorney, be able to request an adjournment if the court does not adjourn all motions for *pro se* homeowners, file oppositions, and make other new filings.

**Emergency Filings of Orders to Show Cause**

A system should be devised to permit *pro se* homeowners to present orders to show cause (either virtually or through the clerk's office with safe social distancing) for emergency applications. The court could set up computer kiosks in public areas for *pro se* homeowners to

use for filing papers and/or participating in virtual appearances. However, court personnel would need to maintain the kiosks and be able to assist homeowners safely using the safety protocols during this pandemic.

Signed orders to show cause should have reasonable service requirements. For example, a *pro se* homeowner cannot be expected to personally serve or fax a signed order to show cause during the pandemic. The court should also provide *pro se* litigants filing OSCs with the list of legal services providers serving the county.

**Represented Homeowners**

In cases where foreclosure litigants are represented by counsel, all motions should be filed electronically using the e-file system, and all appearances should be virtual. The court should also make every effort to conference cases where a settlement may be feasible and should return cases to the 3408 conference part, if necessary, to facilitate negotiations between the parties.

For cases in which either party has served discovery demands, the court should hold both preliminary and compliance conferences setting forth discovery deadlines. Because most attorneys are continuing to work remotely, with limited ability to conduct face-to-face meetings with their clients and access physical files, the court should grant substantial adjournments upon request to provide enough time for the parties to obtain documents properly demanded by the opposing party. The court should also entertain discovery motions if a party fails to comply with reasonable discovery deadlines. All depositions should be conducted electronically or adjourned until the parties can meet safely in person while practicing social distancing.

## 3. Post Foreclosure Judgment Phase Issues

As with proceedings before judgment is entered, we anticipate the need for enhanced procedural safeguards for litigants—particularly self-represented litigants—whose foreclosure cases have gone to judgment. Post-judgment procedures implicate issues of access, process, and safety, whether the defendant is seeking to stay a sale, to obtain accurate and timely information about an auction conducted in compliance with laws and rules, or to move for disbursement of surplus funds post-auction. Indeed, the prospect of reopening the courts post-pandemic affords a valuable opportunity to consider improvements to existing practices and procedures to make them fairer, more transparent, and more equitable.

**Auctions**

The challenges for *pro se* litigants presented by the pandemic, as detailed above, will compound the existing irregularities and deficiencies in the auction process and in the information available about scheduled auctions, which were described in our November 19, 2019 letter and discussed during our January 9, 2020 meeting. As we discussed, lack of uniformity across the judicial system only exacerbates these issues, which include a lack of adequate notice

of scheduled sales, and undue advantages held by professional bidders, particularly those representing investors and their agents, over ordinary non-professional aspiring homebuyers.

Accordingly, we urge that auctions be suspended until the courts can issue uniform rules and improve procedures in notice and access. In addition, we recommend that the following new approaches be considered:

- All *pro se* homeowner defendants against whom a foreclosure judgment has been entered should automatically be referred to a free legal services provider for advice.
- Following the abatement of the crisis, auctions should not be scheduled for a period of several weeks, to permit *pro se* defendants to seek out legal services.
- OCA should require each court to create and maintain an easily accessible website listing all scheduled sales and terms of sale by date, along with the court's auction rules in English and other languages used in the county.
- Each courthouse must ensure that *pro se* defendants have meaningful access to the courts and the assistance of the Help Center/Office for the Self-Represented for orders to show cause as needed.
- All *pro se* homeowner defendants who have sought a stay of sale by way of an emergency order to show cause should be referred to a free legal services provider for advice. If the *pro se* application is procedurally defective but not clearly substantively inadequate, the application should be held in abeyance and the court should stay the sale until the homeowner has an opportunity to consult with a legal services provider.
- A procedure by which people may participate in auctions remotely as an alternative to in-person participation, and potentially as a replacement to in-person auctions, with supports to allow those without access to adequate technology to participate in bidding, should be implemented.

**Surplus motions**

The statutory right to secure surplus funds owed to the homeowner after a foreclosure is an important one that ameliorates, at least in part, the stripping of equity from New York's gentrifying neighborhoods that flow from foreclosures, but, is one that is exercised in shockingly few cases.[2] The judiciary should not be an accomplice to this equity-stripping and should take proactive steps to ensure that homeowners have meaningful access to their surplus remedy. The process of moving for confirmation of the referee's report of sale and disbursement of surplus funds post-auction is complex, and homeowners are frequently not informed, or not timely informed, about their right to seek surplus funds from the sale. These problems will become more significant, particularly *for pro se* defendants, when auctions resume. Moreover, struggling families, in the current economic climate, will be more in need of access to the surplus funds to

[2] A recent examination revealed that between January 1, 2016 and November 30, 2019 there was more than $71 million in surplus funds from foreclosure auctions just in the Kings County Clerk's Office, a substantial percentage of which will not be returned to defendants by way of surplus motions because of the difficulty of accessing the process for seeking recovery of surplus funds or lack of information about its availability altogether.

which they are entitled than ever, and it therefore behooves the judiciary to take steps to make the right to surplus funds meaningful and not merely theoretical.

It is crucial to provide homeowners in foreclosure better notice about the surplus funds remedy, ideally before entry of judgment of foreclosure and sale, but at a minimum in the form of a notice from the Court immediately upon auction of the property, including the referee's report of the auction, notifying the homeowner of their right to seek any surplus, and providing contact information for local legal services helping with such applications.

The surplus motion process varies somewhat from court to court—an issue in itself—but typically entails an in-person trip to the Clerk's Office to obtain certain documents generated in connection with the auction; then submission of an application to the Department of Finance for proof of the surplus funds on deposit; and then submission of the motion to the court. This byzantine procedure is made more troublesome still by the fact that the intricacies often trip up the courts charged with adjudicating these motions, necessitating successive motions which likely causes many defendants to give up entirely.

We propose that the process be streamlined and simplified. At the very least, it should be possible for the defendant to obtain the required documents from court through means other than an in-person visit, and for the Department of Finance to process a bare-bones application by accessing supporting documents from its own files and/or from online court resources. Moreover, homeowner defendants should be afforded plain-language notice (in English and other languages used in the county) of the potential availability of surplus funds post-sale when the case is commenced and at regular intervals in the course of the foreclosure case—particularly if and when foreclosure settlement conference proceedings are terminated, and after the grant of an order of reference and after grant of a motion for judgment of foreclosure and sale.

We are cognizant of the many challenges the current health crisis has presented to the judiciary, and we applaud the herculean efforts to transition to virtual appearances for essential matters practically overnight, and the subsequent efforts to resume activity in non-essential matters. The courts' residential foreclosure docket, which presented numerous challenges and areas for improvement even before the current health crisis, presents a unique set of challenges and risks as activity resumes in New York City's crowded courtrooms. We hope you will consider these concerns and recommendations seriously, and we would be happy to discuss these issues with Your Honor at your convenience.

Respectfully,

Jacob Inwald

Enclosure

cc: Hon. Janet DiFiore

Hon. Sherry Klein Heitler
Attorney General Letitia James
New York City Public Advocate Jumaane D. Williams
Senator Brad Hoylman, Chair, Committee on Judiciary
Assemblyman Jeffrey Dinowitz, Chair, Committee on Judiciary
Rose Marie Cantanno (New York Legal Assistance Group)
Tamara del Carmen (Brooklyn Legal Services Corp. A)
Michael Corcoran (Grow Brooklyn, Inc.)
Donna Dougherty (JASA/Legal Services for Elder Justice)
Oda Friedheim (The Legal Aid Society)
Rachel Geballe (Brooklyn Legal Services)
K. Scott Kohanowski (City Bar Justice Center)
Alexis Lorenzo (Bronx Legal Services)
Sara Manaugh (Staten Island Legal Services)
Patrick T. Pyronneau (CAMBA Legal Services, Inc.)
Joseph Rebella (Mobilization for Justice)
Franklin Romeo (Queens Legal Services)
Mary E. Sheridan (Teamsters Local 237 Legal Services Plan)
Mark Weliky (Queens County Bar Association Volunteer Lawyers Project)
William Whelan (DC 37 Municipal Employees Legal Services)
Peter White (Brooklyn Bar Association Volunteer Lawyers Project)

Legal Services NYC
DEMAND JUSTICE

# EXHIBIT B TO TESTIMONY OF JACOB INWALD, AUGUST 21, 2020 JOINT HEARING: COVID-19 AND THE UNIFIED COURTS SYSTEM

**Legal Services NYC** | 40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 | Fax: 646-442-3601 | www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director | **Susan J. Kohlmann**, Board Chair

LSC


# NEW YORKERS FOR RESPONSIBLE LENDING

Via Email to lmarks@nycourts.gov

April 15, 2020

The Honorable Lawrence K. Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Implementation of Virtual Court Appearances in Nonessential Matters

Dear Judge Marks:

We write concerning implementation of Administrative Order 85/20, which expands virtual court operations to nonessential court matters in light of the ongoing COVID-19 crisis. We recognize the herculean efforts by the administrative leadership, judges and non-judicial staff within the Office of Court Administration over the past month in moving to virtual appearances in essential matters. As the judiciary transitions to virtual operations in "nonessential" categories of cases, we respectfully offer some suggestions for "best practices" in order to ensure the protection of especially vulnerable communities and those without counsel, for whom virtual appearances can pose special challenges that can impair access to justice.

**New Yorkers for Responsible Lending (NYRL)** is a statewide coalition of more than 170 organizations that promotes economic justice as a matter of racial and community equity. Our membership includes legal service providers, housing counseling agencies, unions, credit unions, AARP, Consumer Reports, and other community groups. We work with low-to-moderate income ("LMI") people throughout the State, many of whom are elderly and/or have limited English proficiency ("LEP"). The populations we serve overlap greatly with the population of people who appear *pro se* in New York State courts.

As the Office of Court Administration implements virtual appearances, we would encourage it to keep in mind the following recommendations so that these appearances do not have an adverse impact on the thousands of *pro se* litigants throughout the State. In making our recommendations, we have been guided by these key considerations:

- Many people, including LMI, elderly, LEP persons and others, would have huge difficulties in appearing virtually, and their access to justice would therefore be curtailed if virtual appearances are made mandatory;
- Virtual appearances by *pro se* litigants should be voluntary only, when they choose to "opt in";
- Many *pro se* litigants would be unable to meaningfully participate virtually due to technological obstacles, including the lack of computers and unavailability of high-speed internet;

- Limited scope legal assistance programs that have partnered with courts to assist *pro se* litigants, have been suspended;
- New York residents are simply weighed down and overwhelmed by the conditions that the COVID-19 virus has forced upon us, and will not have the time, ability or resources to navigate virtual appearances.

In light of the above considerations, we encourage the judiciary to keep in mind the "digital divide" that results from the economic inequality that pervades our society when expanding virtual operations to categories of cases with high numbers of unrepresented litigants. Therefore, we recommend that cases involving *pro se* parties be excluded from virtual appearances for nonessential matters. Courts could make exceptions for *pro se* parties who specifically request virtual appearances if the requesting *pro se* party affirms she or he has the technological capacity to participate. As with e-filing, which had a rocky roll-out when the needs of unrepresented parties initially were not taken into account, we recommend that there be a presumption that unrepresented parties are excluded from virtual appearances unless they specifically request to "opt in" to virtual participation.

While we recognize that "justice delayed is justice denied," our concerns over delay are outweighed by our concerns that virtual appearances could quite easily negatively impact *pro se* litigants. We therefore would recommend that appearances involving *pro se* litigants resume in person when the courts reopen. For cases where time is of the essence, we recommend that a *pro se* litigant be permitted to join by telephone conference call if the litigant prefers. There are many litigants who would experience difficulties with or who lack the technological equipment or expertise to manipulate Skype or similar video conferencing.

Where parties do appear virtually, these appearances are made more complicated by the number of people who must call in separately to those conversations, especially when they are "on the record." In order to alleviate one potentially complicating factor, Courts should avoid requiring virtual appearances for any litigants who require the use of interpreters in nonessential matters.

Courts should be aware that, throughout the state, many litigants lack access to reliable high-speed internet. While this problem may be especially acute in more rural parts of the State, it is also true for many litigants in urban and suburban settings.

Courts should also be aware of the enormous scheduling pressures faced by families throughout the State during this time. Although most people in the State are either working from home or have lost their jobs, many *pro se* litigants work in service industries that are deemed essential, such as grocery stores, delivery services, hospitals, or restaurants. While those litigants have limited control over their schedules under the best of circumstances, now they face even less flexibility because of the heavy demand placed on their employers. Additionally, many litigants, even those who are fortunate to be able to work from home, are also providing care for children or other loved ones around the clock, which makes appearing at set times more complicated. Litigants may also be managing medical appointments (now made more difficult by the limitations on in-person medical care) for themselves or family members., In light of these circumstances, Courts should not issue defaults for any litigants who fail to appear for scheduled

virtual appearances. Instead, these virtual appearances should be rescheduled with the maximum amount of flexibility possible.

Once the Courts reopen we anticipate that they will be inundated by new filings, especially from plaintiffs in "bulk" practices like debt collection or foreclosure. We recommend that the Courts impose reasonable limits on new filings by, for example, only permitting single plaintiffs or firms to file a limited number of cases per day or per week. (Courts could, of course, make exceptions for matters facing statutory deadlines to file.)

We appreciate that these are unprecedented and difficult times and that the Office of Court Administration has moved swiftly and thoughtfully in its response to this crisis. We hope these suggestions for best practices are helpful as OCA moves forward. Please feel free to contact us if we can provide additional assistance.

For more information, please contact:


- Christopher Newton, Queens Legal Services, cnewton@lsnyc.org
- Jacob Inwald, Legal Services NYC, jinwald@lsnyc.org
- Joseph Keleman, Western New York Law Center, jak@wnylc.com
- Carolyn E. Coffey, Mobilization for Justice, ccoffey@mfjlegal.org
- Robert A. Martin, District Council 37 (Retired), martinram9@gmail.com


cc: Hon. Janet DiFiore
Hon. Sherry Klein Heitler
Attorney General Letitia James
New York City Public Advocate Jumaane D. Williams
Senator Brad Hoylman, Chair, Committee on Judiciary
Assemblyman Jeffrey Dinowitz, Chair, Committee on Judiciary

Legal Services NYC
DEMAND JUSTICE

# EXHIBIT C TO TESTIMONY OF JACOB INWALD, AUGUST 21, 2020 JOINT HEARING: COVID-19 AND THE UNIFIED COURTS SYSTEM

**Legal Services NYC** | 40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 | Fax: 646-442-3601 | www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director | **Susan J. Kohlmann**, Board Chair

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Legal Services NYC
DEMAND JUSTICE

November 19, 2019

Hon. Lawrence Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, New York 10004

Re: The State of Residential Foreclosure Cases in the New York Courts

Dear Judge Marks:

We are very appreciative of the collaborative relationship we have had with the Office of Court Administration, and with leadership at the courthouses across New York City, which has led to many tangible improvements in the judicial foreclosure process, and we hope to continue to partner with the judiciary to ensure a fair and efficient court process for New York's distressed homeowners. I write to address some recent concerns and trends we have observed, and to request a meeting to discuss these issues.

Legal Services NYC ("LSNYC") is the Technical Assistance partner to the Center for New York City Neighborhoods, which is the New York City Anchor Partner for the Office of the Attorney General's Home Ownership Protection Program ("HOPP"). As LSNYC's director of foreclosure prevention I oversee LSNYC's foreclosure prevention practices across New York City, and I regularly consult with and provide technical assistance to all of the HOPP-funded legal services providers representing New York's low and moderate income homeowners in the judicial foreclosure process across both New York City and New York State. I therefore have a unique perch from which to observe how the courts, at both the trial and appellate levels, are administering residential foreclosure cases and implementing the consumer protections enacted in recent years by the legislature and the challenges faced by distressed homeowners navigating the judicial foreclosure process.

With recent legislation making New York's foreclosure consumer protections (including pre-foreclosure notices and mandatory judicial foreclosure settlement conferences) permanently applicable to all categories of home loans, and thereby a permanent feature of the judicial foreclosure process, it is important to address how the judiciary's "Excellence Initiative" and prioritization of time-based rather than qualitative-based "Standards and Goals" have affected the adjudication of residential foreclosure cases. As these cases determine litigants' fundamental interest in homeownership—and often the investment of life savings—I am sure that you share our objective of ensuring a meaningful settlement conference process in these cases, which disproportionately impact New York's communities of color and the elderly. Given the court's focus on pushing cases through the process quickly, we are concerned about the increased

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

number of foreclosure judgments, especially in cases where homeowners are unrepresented, and we have concerns about the conduct of surplus proceedings and auction procedures, especially in gentrifying neighborhoods experiencing substantial appreciation in home values.

**Standards and Goals/Excellence Initiative/Court Practices during the Judicial Foreclosure Process:**

While the particulars vary from one county to another, a pervasive theme experienced across the state results from a focus on "clearing dockets" and "reducing backlogs," which places pressures on judges and court staff to rush cases through, often thwarting settlement of resolvable cases and relegating contested foreclosure litigation to a second-class status. Negotiating loan modifications and other home-saving solutions, specifically contemplated as the goal of the settlement conference process pursuant to CPLR § 3408, can be a time-consuming process, between the delays that inhere in the Kafkaesque mortgage servicer loss mitigation environment and the delays that have characterized the application process for such resources as the now-defunct New York State Mortgage Assistance Program. Yet many courts have imposed arbitrary time limits on the CPLR § 3408 settlement conference process, making it difficult to conclude sustainable home-saving solutions. Long-pending cases may not reach the settlement conference parts for years owing to delayed Request for Judicial Intervention ("RJI") filings by plaintiffs, or due to indulgent grants of motions to restore actions dismissed as abandoned. Cases deemed violative of "Standards and Goals" deadlines are often rushed through settlement conferences and requests to permit such cases to remain in conferences to allow for a meaningful loss mitigation process are sometimes denied based solely on the year of the index number.

While some courts may permit settlement negotiations to continue after formal release from settlement conferences, with the release of cases from formal conferencing pursuant to CPLR § 3408 homeowners lose the benefit of CPLR § 3408(h), barring the accrual of attorneys' fees during the settlement conference process; lose the good faith negotiation standard mandated by CPLR § 3408(f); and may even lose their counsel, as many non-profit legal services providers represent homeowners pursuant to limited retainers that provide for representation only during the CPLR § 3408 process. Furthermore, in many courts adjournments to allow for completion of loss mitigation are denied, even when sought by both sides, and deadlines are imposed to proceed with motions for judgment of foreclosure and sale in direct conflict with the prohibitions on "dual tracking" (moving for foreclosure judgments while complete loss mitigation applications are being considered) embodied in federal law (*e.g.*, Real Estate Settlement Procedure Act, Regulation X, 12 C.F.R. § 1024.41(g)). Additionally, such deadlines are often set in a way to curtail discovery, especially for those without representation who lack the ability to challenge plaintiffs' disregard of discovery requirements.

Granting the parties sufficient time to complete the loss mitigation process supports both New York and federal policy preferences for successful resolution of foreclosures through loss mitigation rather than foreclosure sale, yet New York courts often require the commencement of costly and wasteful motion practice without allowing for exhaustion of the loss mitigation

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
Raun J. Rasmussen, Executive Director, **Susan L. Kohlmann**, Board Chair

process.

Although CPLR § 3408 is a broad and remedial statute granting the courts considerable latitude to address all the issues arising during the loss mitigation process, it is often impossible to persuade judges, referees or court attorneys to permit discussion of the merits of the legal claims and defenses that, in any other context, is an expected part of settlement discussions. Excessive, unjustified attorneys' fees and other costs, similarly, are often barriers to consensual resolutions of foreclosure cases, yet the courts often refuse to compel plaintiffs to justify such expenses, even though CPLR § 3408(e)(1) imposes such an obligation. Enforcement of CPLR § 3408(l) is also uneven. Some courts do not provide defendants with the statutorily mandated information about the right to answer the complaint following the first conference and about available resources for assistance. Some courts remain hostile environments for the unrepresented, with confusing instructions at the beginning of each calendar that many homeowners cannot follow and draconian dress codes enforced so as to generate homeowner defaults or adjournments requiring homeowners to lose additional days of work.

After release from settlement conferences in contested cases, many courts treat residential foreclosure cases as a form of inferior litigation, even though such actions are fully governed by the provisions of the CPLR. As mentioned above, many courts set unrealistic deadlines for completion of discovery, and some refuse to issue preliminary conference orders that can help ensure compliance with discovery obligations. Some judges have been observed advising litigants that they do not "like" discovery in foreclosure cases, that they do not believe there are legal defenses to foreclosure, and that discovery-related motion practice is discouraged. While foreclosure plaintiff law firms are routinely permitted to use "per diem" lawyers who often appear without authority or familiarity with the facts or legal issues, it is not uncommon to observe hostile treatment by court personnel of both unrepresented homeowners and homeowner advocates.

As with cases in the settlement conference phase, denial of consensual adjournments due to pending loss mitigation, even when plaintiffs request such adjournments to avoid violating CFPB regulations that prohibit moving forward with foreclosure when loss mitigation applications are pending, is frequently reported. Similarly, in situations when a stay is mandated by law, such as death of a party or bankruptcy filings, cases have been observed in which mere adjournments instead of legally-mandated stays are directed. Some advocates report cursory motion disposition practices, with decisions apparently rendered without reference to the legal arguments advanced, while others report use of standardized forms and orders or other administrative treatment of foreclosure actions that ignore the existence of counterclaims or affirmative defenses.

A substantial part of the state's foreclosure docket, not counted in the Office of Court Administration statistical reports on foreclosure cases, is at the appellate divisions, as the many cases "cleared" from the Supreme Court dockets have merely migrated to the intermediate appellate courts. Indeed, a recent article published in the New York Law Journal by Justice Alan

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

D. Scheinkman divulged that

> [a]pproximately one-third of the court's civil inventory consists of foreclosure cases. ... With the court now having established clear guidelines to apply in certain recurring situations, such as the sufficiency of affidavits on summary judgment motions, the court plans to create special, but regular, foreclosure-only submission calendars starting in the Fall. The use of these special foreclosure calendars should help advance the disposition of these appeals and should also free up slots on regular calendars for non-foreclosure civil appeals.

https://www.law.com/newyorklawjournal/2019/09/02/second-department-hearing-deciding-cases-at-record-rate/.

While it was not surprising to learn that foreclosures represent one-third of the Second Department's civil docket, the decision to deprive foreclosure litigants of oral argument and relegate them to a kind of second-class litigation status in which the cases are not deemed worthy of oral argument—premised on the notion that the courts have established clear guidelines to apply in recurring situations—causes us concern. It is hard to imagine a class of civil litigation more worthy of individualized, case-by-case adjudication than foreclosure cases, in which the defendants' families' stability and their largest financial investments are at stake. The message this sends to New York's struggling homeowners—already the victims of discriminatory and predatory lending practices that landed the country in the worst foreclosure crisis since the Great Depression and of abusive mortgage servicing practices that have generated many investigations and multi-state settlements resulting from attorney general prosecutions—is an unfortunate one.

**Post Foreclosure Judgment Issues:**

Homeowners Need Additional Notice and Assistance to Seek Surplus Funds

With property values appreciating in some regions, many more foreclosure auctions result in surplus funds than was typical in earlier years of the foreclosure crisis. Our foreclosure unit at Brooklyn Legal Services tracked foreclosure auctions that took place in Kings County between June and December in 2017, and learned that during that time as many as 25% of foreclosure auctions may have resulted in a surplus, depending in some cases upon the costs of the sale and outstanding interest and fees. Because the Real Property Actions and Proceedings Law does not require notice to the parties unless any party files a claim to surplus funds, many homeowners are not even aware of their right to claim surplus funds. Records of completed foreclosures show that homeowners may not seek or be awarded surplus funds to which they are entitled, as court records revealed instances in which substantial surplus funds were on deposit with the court without any surplus funds applications having been made. This issue could be addressed with better notice to homeowners about the surplus funds remedy, ideally before entry of judgment of foreclosure and sale, but at a minimum in the form of a notice from the Court immediately upon auction of the property, including the referee's report of the auction, notifying

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

the homeowner of their right to seek any surplus, and providing contact information for local legal services providing assistance with such applications.

Auction Practices Disadvantage Homeowners

After years of few cases moving to final disposition, the number of cases proceeding to judgment and eventual auction have been increasing, partly because the courts are aggressively pushing of cases to final judgment, and partly because appreciating property values are removing industry disincentives to complete foreclosures and assume ownership of foreclosed properties. Our foreclosure practice at Brooklyn Legal Services observed the auction process in Kings County, which revealed that weekly foreclosure auctions began several years ago to occur at significantly higher volume than in prior years of the ongoing foreclosure crisis. While some of the specific concerns may be specific to Kings County, there are likely similar issues across the counties where foreclosure auctions are occurring with greater frequency as property values recover in many regions.

On Thursday afternoons Room 224 of the Kings County Courthouse is filled to capacity and frequently chaotic. Bidders openly collude with each other during the auctions to depress prices and to arrange to split or assign successful bids. Although the court has created rules intended to quash the most egregious behavior and create some transparency in an inherently opaque courtroom process—and although courtroom staff make frequent announcements asking for quiet and calm—the auction process frequently deviates from the court's posted procedures. For example, courtroom staff members often fail to require bidders to state their first and last name or address or to check the identification of all bidders. Court personnel have permitted familiar bidders to use the same funds as a bond for multiple property purchases and other bidders to leave the courthouse in order to withdraw additional funds after winning a bid. Both of these practices are contrary to the Court's official rules. These ad hoc procedures favor professional bidders who are known to court staff and hired by institutional and other experienced bidders. These deviations disadvantage members of the public who are not court insiders and whose meaningful presence would improve the efficiency of auctions and would permit more homeowners to preserve their equity through the auction process. We have heard similar reports from other counties as well, so there is little reason to believe that these sorts of irregularities and/or collusion are confined to Kings County.

Additionally, the means of advertising auctions are inadequate. R.P.A.P.L. § 231 requires that notices of auctions of foreclosed properties be placed in a newspaper published in the county in which the property is located over a series of weeks. Unfortunately, the current advertising practices approved by the Court demonstrate that the requirements for publication are woefully inadequate to make the auctions fair and open, and many advertisements of auctions appear in niche publications with limited circulation. The statute does not define what it means to "publish" a newspaper, nor does it state minimum circulation requirements. As a result, the Court regularly approves publication in newsletters with extremely limited and niche circulation, including the 5 Towns Jewish Times, The Jewish Press, The Jewish Herald, The Daily

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

Challenge, and Our Times Press. As an example, while Brooklyn has a diverse population of over 2.5 million residents, the 5 Towns Jewish Times serves a community in Nassau County and claims in its press kit to circulate to a mere 20,000 households. Our Time Press, similarly, appears to serve only the Bedford-Stuyvesant community, a neighborhood that represents less than 6% of Brooklyn's population. Its auction notices are not even available for viewing on its website.

Notice requirements should spur awareness of the auction and the public's participation, increasing the efficiency of the market and ensuring that Brooklyn homeowners subject to foreclosure gain the benefit of the equity they have saved in their homes. Instead, the flawed implementation of the notice provision ensures that the auction is a place where insiders may collude to depress and even fix prices to the benefit of real estate speculators or, even worse, of scammers whose presence in the vicinity of foreclosures is ever-pervasive. The judiciary should consider issuing rules interpreting the statutory publication requirement to ensure meaningful notice to the broadest possible spectrum of the community, so that potential auction purchasers are not limited to real estate speculators exacerbating displacement and gentrification.

We are confident that you share our goal of a judicial foreclosure process that is fair and equitable to New York's distressed homeowners as well as to the financial institutions prosecuting foreclosure actions, and which gives effect to the consumer protections enacted by New York State to mitigate the adverse impacts of avoidable foreclosures to affected families and their surrounding communities and taxpayers. I hope you will therefore consider this request to schedule a meeting with the homeowner advocate community to discuss how we can better ensure a judicial foreclosure process that inspires the confidence not just of the financial institutions that utilize it to prosecute foreclosures but of the distressed homeowners required to navigate it, for whom this process is often their only exposure to the New York court system.

Respectfully,

Jacob Inwald

Enclosure

cc: Hon. Janet DiFiore
Hon. Sherry Klein Heitler
Attorney General Letitia James
New York City Public Advocate Jumaane D. Williams
Senator Brad Hoylman, Chair, Committee on Judiciary
Assemblyman Jeffrey Dinowitz, Chair, Committee on Judiciary

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

Legal Services NYC
DEMAND JUSTICE

# EXHIBIT D TO TESTIMONY OF JACOB INWALD, AUGUST 21, 2020 JOINT HEARING: COVID-19 AND THE UNIFIED COURTS SYSTEM

**Legal Services NYC** | 40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 | Fax: 646-442-3601 | www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director | **Susan J. Kohlmann**, Board Chair

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Legal Services NYC
DEMAND JUSTICE

February 5, 2020

New York State Legislature
2020 Joint Budget Hearing
Housing

My name is Jacob Inwald. I am the director of foreclosure prevention at Legal Services NYC, and I submit this testimony on behalf of Legal Services NYC in support of continued funding for New York's Home Ownership Protection Program ("HOPP"), which is the sole source of funding for the statewide network of housing counseling agencies and legal services agencies providing foreclosure prevention services for New York's struggling low and moderate income ("LMI") homeowners.

Legal Services NYC ("LSNYC") is the nation's largest provider of free civil legal services to the poor. For more than 50 years, LSNYC has provided expert legal assistance and advocacy to low-income residents of New York City. Each year, LSNYC's neighborhood offices across New York City serve tens of thousands of New Yorkers, including homeowners, tenants, the disabled, immigrants, the elderly, and children.

LSNYC is also the oldest and largest provider of foreclosure prevention legal services in New York City. LSNYC's foreclosure prevention projects represent distressed homeowners and victims of predatory and discriminatory lending in neighborhoods decimated by foreclosures across Brooklyn, Queens, Staten Island, and the Bronx, and it has provided such assistance to nearly 20,000 families since 2007.

The HOPP network comprises nearly 90 non-profit housing counseling and legal services agencies that help New York homeowners, coop owners and condo owners avert homelessness and displacement by preventing avoidable foreclosures, combating mortgage fraud, deed theft, loan modification and partition scams, and challenging predatory and discriminatory lending and abusive mortgage servicing practices that disproportionately impact New York's most vulnerable communities—seniors and people of color. The network serves every county in New York State and all five boroughs of New York City, but current funding for this vital network ends on March 31, 2020 and at present is not funded in the Governor's executive budget.

- For more than a decade, this network has been helping families in every county across the New York State, and in each of the five boroughs of New York City, navigate complex housing challenges -- including mortgage fraud, scams, displacement, discriminatory lending and mortgage servicing -- and it has helped thousands of families to keep their homes and allowed them to stay in their communities. It has helped not just the individual families affected by foreclosures but the communities at large, by preventing displacement and by preventing the increased crime and reduced property values that accompany waves of foreclosure, which, in turn, adversely affect the local community tax base.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

- The network was initially funded by the State and administered by New York Homes and Community Renewal, but for the last several years was funded by mortgage servicing settlement proceeds obtained by the Attorney General's office, which has administered the network through its Homeowner Protection Program, known as "HOPP." That funding expires on March 31, 2020, and more recent bank settlement funds, due to changes in the law, can no longer be directed to these services by the Attorney General's office—they must now be allocated through the state budget process.

- Already, because the funding was not included in the Executive Budget, leaving a cloud of uncertainty, the nonprofits providing these services are not be able to plan for the future, and are having to curtail intake as these are complex cases that take a long time to resolve.

- When the Homeowner Protection Program (HOPP) ends in March 2020, two-thirds of the state's existing foreclosure prevention program capacity will disappear overnight, leaving some regions with no service providers if funding is not provided, and slashing the network here in New York City. Additional reductions are anticipated in the months thereafter.

- Over 100 advocates providing services to NYC homeowners will be impacted in the coming year. These staff will be laid off or transitioned to other programs.

- Not only will New York families suffer and face displacement; employees across almost 90 organizations are in danger of losing their jobs, and their expertise, along with the associated infrastructure in place that supports this network, which represents a substantial investment by the State of New York, will be discarded.

- As of early 2019 the network had already helped 100,000 NY homeowners since 2012. Those receiving this assistance are working, low and moderate-income families, New Yorkers of color who were targeted for predatory loans, and seniors battling a wave of foreclosures on reverse mortgages. The network mitigates displacements from foreclosures, scams or mortgage distress and challenges abusive mortgage servicing by financial institutions and discriminatory lending practices such as reverse redlining, in which vulnerable communities are targeted for the most toxic of loan products. Most importantly, it levels the playing field, giving distressed homeowners, condo owners and coop owners an advocate in court and in negotiations with large financial organizations.

- These disappearing service providers are embedded in New York's consumer protections enacted after the foreclosure crisis, which were recently made permanent features of the judicial foreclosure process:

  Lenders are required by law to send pre-foreclosure notices specifically identifying counseling agencies serving the homeowners' county—the very agencies that will be no longer funded to do foreclosure prevention work after March 2020.

**Jacob Inwald, Director of Foreclosure Prevention**
**Legal Services NYC, Legal Support Unit**
40 Worth Street, Suite 606, New York, NY 10013
Direct Phone: 646-442-3634 Facsimile: 646-442-3645 e-mail: jinwald@lsnyc.org www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

Network providers are integral to NY's pioneering foreclosure settlement conference process, where they partner with the courts to staff clinics and conferences and have been instrumental in drastically increasing the numbers of homeowners with representation at settlement conferences and in increasing the numbers of homeowners answering foreclosure complaints and preventing default judgments. Indeed thanks to this network a majority of homeowners facing foreclosure now has representation during the court settlement conference process, whereas ten years ago the vast majority of homeowners had no counsel and most foreclosure cases resulted in default judgments in which homeowners did not have the opportunity to preserve their defenses or assert their claims. Recent amendments to that law provide homeowners attending their first conference a chance to avert default judgment and seek help from HOPP-funded legal services providers to file an answer to the foreclosure complaint, but that statutory mandate will be meaningless without HOPP funded agencies staffing conferences to provide this assistance.

- These services are a crucial tool in preserving sustainable, affordable homeownership. Especially in New York City, the loss of a home to a foreclosure that could have been averted also represents the loss of naturally occurring, affordable rental housing, as many of the homes impacted incorporate affordable rental units that are lost to the rental market when the home is lost to foreclosure and sold off to investors.

- No homeowner should have to experience the fear of displacement. New York families continue to need access to free resources and experts to help them understand their options during what is often the most difficult time of their life.

- Families save their money for years to achieve the American dream of owning a home -- however, sometimes they fall on hard times or are victim of a predatory scam, and they need trusted, legitimate help.

- For the last decade, the network has strengthened communities by helping families stay in the neighborhoods that they've lived in for generations.

- Foreclosure is also still a growing problem, as New York's economic recovery has been uneven. In 2019, there were approximately 22,000 new foreclosure cases filed in New York. More than 164,000 pre-foreclosure notices were filed against delinquent homeowners in 2018, the last year for which complete data is available. A testament to HOPP's success is the fact that many of those filings do not lead to a foreclosure filing—the default notice referring homeowners to HOPP agencies providing assistance allows for many cases to be resolved before they ripen into foreclosure litigation. But with this network defunded, leaving homeowners without access to advocates before cases are started in court, we can anticipate an *increase* in new court filings.

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- Scams and fraud resulting in displacement are on the rise, especially in gentrifying neighborhoods across New York City. The single most effective ammunition NY has against these scammers is the HOPP network, as every victim of a deed theft scam is a desperate homeowner seeking to save their home from foreclosure. yet the Executive budget proposes to *dismantle* that network by eliminating its funding.

- Foreclosures typically spike when natural disaster, economic disruptions, or government shutdowns occur; this network stepped in after Hurricane Sandy, which had a horrific impact on New York City homeowners. New York City neighborhoods will be devastated without the safety net of housing and legal counselors to help families navigate the arcane judicial foreclosure and loss mitigation processes.

- If the existing network in which the State has invested is allowed to atrophy, homeowners will be left to fend for themselves, or worse, be at the mercy of scammers just waiting to take advantage of vulnerable homeowners, coop owners and condo owners desperately seeking to save their homes, as they defend themselves in court or attempt to resolve their mortgage distress—these are complicated, bureaucratic processes that can be nearly impossible to navigate without a nonprofit housing counselor or lawyer.

- With $20 million in funding, the network will be able to continue its great work and combat urgent housing issues across the state, including:

  The flow of zombie properties that destabilize neighborhoods

  Mitigating distressed mortgage and tax foreclosures, preventing displacement

  Stopping scammers from stealing people's homes and charging for loan modification services that are never provided

  Providing representation to the state's seniors, who have been facing a wave of reverse mortgage foreclosures during the last two years, who have only recently received the consumer protections New York has provided to other residential mortgage foreclosure defendants.

For more information, please contact Jacob Inwald, at jinwald@lsnyc.org or 646-442-3634

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Legal Services NYC
DEMAND JUSTICE

# EXHIBIT E TO TESTIMONY OF JACOB INWALD, AUGUST 21, 2020 JOINT HEARING: COVID-19 AND THE UNIFIED COURTS SYSTEM

**Legal Services NYC** | 40 Worth Street, Suite 606, New York, NY 10013
Phone: 646-442-3600 | Fax: 646-442-3601 | www.LegalServicesNYC.org
**Raun J. Rasmussen**, Executive Director | **Susan J. Kohlmann**, Board Chair

LSC

Legal Services NYC
DEMAND JUSTICE

**MEMORANDUM REGARDING**

**A.10851/S.8789**

**August 19, 2020**

**BILL NUMBER:** A.10851/ S.8789

**SPONSORS:** Assembly Member Dinowitz/Senator Kavanagh

**TITLE OF BILL**: AN ACT to amend Section 595-b of the Banking Law

**SUMMARY OF BILL**:

This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

**STATEMENT REGARDING THE BILL**:

Legal Services NYC ("LSNYC") believes that A.10851/S. 8789 would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity. The need for a private right of action to make these important consumer protections enforceable when mortgage servicers violated them was clear even before the pandemic unleashed a new wave of pain on New York's struggling homeowners, many of whom have yet to recover from the foreclosure crisis that precipitated the Great Recession.

Legal Services NYC ("LSNYC") is the nation's largest provider of free civil legal services to the poor. For more than 50 years, LSNYC has provided expert legal assistance and advocacy to low-income residents of New York City. Each year, LSNYC's

**Jacob Inwald, Director of Foreclosure Prevention**
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**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

neighborhood offices across New York City serve tens of thousands of New Yorkers, including homeowners, tenants, the disabled, immigrants, the elderly, and children. LSNYC is also the oldest and largest provider of foreclosure prevention legal services in New York City. LSNYC's foreclosure prevention projects represent distressed homeowners and victims of predatory and discriminatory lending in neighborhoods decimated by foreclosures across Brooklyn, Queens, Staten Island, and the Bronx, and it has provided such assistance to nearly 20,000 families since 2007. Through affirmative litigation challenging predatory and discriminatory lending, abusive mortgage servicing practices, deed theft scams, foreclosure defense litigation, representation at foreclosure mandatory settlement conferences, and limited scope assistance to unrepresented homeowners.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Even before the pandemic hit, New York City's communities of color were still grappling with the effects of the foreclosure crisis that precipitated the last recession, and for more than ten years foreclosure actions have represented a large percentage of the New York State Supreme Courts' civil docket.

Homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are tasked with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored programs enacted in the wake of the pandemic, or they might seek a loan modification or other relief from the lender in order to avoid loss of their homes to foreclosure. This process is known as "loss mitigation." The mortgage servicing industry is known for shoddy practices, and many mortgage servicing companies have been the subjects of prosecutions by the state and federal authorities which, over the years, have led to multiple mortgage servicing settlements. *See* *http://www.nationalmortgagesettlement.com/*.

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In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq*. (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department of Financial Services would be enforceable by borrowers harmed by their violation with a private right of action just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid

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**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is especially important in the current climate, in which federal regulators have been abdicating their consumer protection responsibilities. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, especially among communities of color and the elderly, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law, would contribute to ameliorating the impact of the crisis and preventing avoidable foreclosures, which have a devastating impact on the families affected and the surrounding community.

***Please contact Jacob Inwald, jinwald@lsnyc.org, 646-442-3634 for more information.***

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**Raun J. Rasmussen**, Executive Director, **Susan L. Kohlmann**, Board Chair

*New Yorkers for Responsible Lending*

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**MEMORANDUM REGARDING**

**A.10851/S.8789**

**August 19, 2020**

**BILL NUMBER:** A.10851/ S.8789

**SPONSORS:** Assembly Member Dinowitz/Senator Kavanagh

**TITLE OF BILL**: AN ACT to amend Section 595-b of the Banking Law

**SUMMARY OF BILL**: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

**STATEMENT REGARDING THE BILL**: The Mortgage Working Group of New Yorkers for Responsible Lending (NYRL) believes that A.10851/S. 8789 would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

NYRL is a statewide coalition established to promote access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities. NYRL's approximately 170 members include community development financial institutions, community-based organizations, affordable and fair housing groups, legal services organizations, housing

counseling agencies, advocates for senior citizens and community reinvestment, and fair lending and consumer advocacy groups.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Such homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored programs enacted in the wake of the pandemic, or they might seek a loan modification or other relief from the lender in order to avoid loss of their homes to foreclosure. This process is known as "loss mitigation."

In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.* (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department of Financial Services would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring

mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law, is one of the most important things that government can do to ameliorate the impact of the crisis and to prevent avoidable foreclosures.

***Please contact Jacob Inwald, jinwald@lsnyc.org, 646-442-3634 or Jordan Zeranti, jzeranti@wnylc.com, 716-828-8438 with any questions.***

**MEMORANDUM IN SUPPORT**

**A.10851/S.8789**

**August 19, 2020**

**BILL NUMBER:** A.10851/ S.8789

**SPONSORS:** Assembly Member Dinowitz/Senator Kavanagh

**TITLE OF BILL**: AN ACT to amend Section 595-b of the Banking Law

**SUMMARY OF BILL**: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

**STATEMENT REGARDING THE BILL**: **JASA/Legal Services for Elder Justice** strongly supports A.10851/S. 8789, which would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

For over 40 years JASA/LSEJ has provided civil legal services to low income Queens residents aged 60 and older in the areas of housing, public benefits, health care and family violence. Since the 1990s, JASA/LSEJ has been assisting seniors who are victims of predatory lending, fraud, financial exploitation, and deed theft scams. In 2007, at the inception of what would become a national economic crisis, JASA/LSEJ expanded its services to address the increasing and alarming incidence of older Queens homeowners facing foreclosures. JASA/LSEJ now provides representation and assistance to over 500 homeowners annually in Queens, Brooklyn and Nassau counties who are facing foreclosure and those victimized by predatory lending, fraud, and deed scams.

As New York continues to face unprecedented health and economic implications of the COVID-19 pandemic, many senior homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Such homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored programs enacted in the wake of the pandemic, or they might seek a loan modification or other relief from the lender in order to avoid loss of their homes to foreclosure. This process is known as "loss mitigation."

In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the wide range of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.* (known as "Regulation X").

But in sharp contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of a vital enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department of Financial Services would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a

new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. With so many New Yorkers, including older New Yorkers, contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law, is one of the most important things that government can do to ameliorate the impact of the crisis.

***Please feel to contact Donna Dougherty at ddougherty@jasa.org 718-286-1515 or Dianne O. Woodburn at dwooodburn@jasa.org 718-286-1590 with any questions.***

# WESTERN NEW YORK LAW CENTER, INC.

37 Franklin Street, 2d Floor, Buffalo, New York 14202

Telephone: (716) 855-0203 Email: wnylc@wnylc.com
Fax: (716) 270-4005

**MEMORANDUM IN SUPPORT**

**A.10851/S.8789**

**August 14, 2020**

**BILL NUMBER:** A.10851/ S.8789

**SPONSORS:** Assembly Member Dinowitz/Senator Kavanagh

**TITLE OF BILL**: AN ACT to amend Section 595-b of the Banking Law

**SUMMARY OF BILL**: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

**STATEMENT REGARDING THE BILL**: The Western New York Law Center strongly supports A.10851/S. 8789, which would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

The Western New York Law Center (WNYLC) is a non-profit law firm providing legal assistance and representation to low-income Western New Yorkers in civil matters, emphasizing those areas restricted by LSC. WNYLC engages in direct representation of homeowners facing foreclosure. Specifically, we represent homeowners at New York State Mandated Settlement Conferences and in mortgage foreclosure litigation, mortgage discharge actions, surplus monies proceedings, and tax foreclosure negotiations.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Such homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their

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It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic

crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law, is one of the most important things that government can do to ameliorate the impact of the crisis.

***Please contact Joseph Kelemen, jak@wnylc.com, (716) 855-0203 ext. 101 or Jordan Zeranti, jzeranti@wnylc.com, (716) 828-8438 with any questions.***

THE
LEGAL AID
SOCIETY
CIVIL

John K. Carroll
*President*

Janet E. Sabel
*Attorney-in-Chief*
*Chief Executive Officer*

Adriene L. Holder
*Attorney-in-Charge*
Civil Practice

# MEMORANDUM IN SUPPORT

## A. 10851/S.8789

An Act to amend Section 595-b of the Banking Law.

Sponsored by Assembly Member Dinowitz/Senator Kavanagh

The Legal Aid Society strongly supports A.10851/S. 8789, which would offer homeowners much needed protection against mortgage lenders' abuses by providing them with a private right of action to enforce New York's strong mortgage servicing rules which otherwise are often violated by lenders with impunity. This bill could not be more timely as homeowners have experienced unprecedented hardships as a result of COVID-19 and need mortgage lenders to comply with servicing rules and provide mortgage relief.

Founded in 1876, The Legal Aid Society is the oldest and largest provider of free direct legal services to low-income families and individuals in the United States. Operating from 26 locations in New York City with a full-time staff of over 1,600, the Society handles more than 300,000 individual cases and legal matters each year. The Society's law reform representation for clients also benefits some two million low-income families and individuals in New York City through impact litigation addressing a broad range of housing and benefit issues.

The Legal Aid Society's Foreclosure Prevention and Home Equity Preservation Project has been assisting homeowners in Bronx and Queens since 2000 to prevent foreclosures, maintain and strengthen homeownership and challenging abusive lending and real estate practices.

Pursuant to Section 595-b of the Banking Law, the Department of Financial Services (DFS) has promulgated detailed regulations governing mortgage servicing in New York State, which provide important consumer protections for New York mortgagors. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 ("Part 419"), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.* (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely

on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by DFS would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

By specifying that such compliance is a condition precedent to commencement of an action in court, and by making clear that lenders retaining mortgage servicing companies would also be liable for violations, the bill would not only strengthen compliance but further ensure that lenders retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. And with so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders is one critical measure that government can undertake to ameliorate the impact of the crisis.

For all the above reasons, we urge passage of this important bill.

If you have questions or need more information, please feel free to contact Oda Friedheim by email ofriedheim@legal-aid.org or by calling 646 306 2657.

NYLAG
New York Legal Assistance Group

MEMORANDUM IN SUPPORT
A.10851/S.8789
August 19, 2020

BILL NUMBER: A.10851/ S.8789

SPONSORS: Assembly Member Dinowitz/Senator Kavanagh

TITLE OF BILL: AN ACT to amend Section 595-b of the Banking Law

SUMMARY OF BILL: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

STATEMENT REGARDING THE BILL: The New York Legal Assistance Group (NYLAG) strongly supports A.10851/S. 8789, which would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. For the past ten years, its Foreclosure Prevention Project has represented distressed homeowners to try and navigate the complicated foreclosure process as well as each banks' convoluted and complicated loss mitigation programs. Far too often, homeowners are faced with lenders who ignore their requests and flagrantly disregard all homeowner protections which are in place.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Such homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored programs enacted in the wake of the pandemic, or they might

seek a loan modification or other relief from the lender in order to avoid loss of their homes to foreclosure. This process is known as "loss mitigation."

In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq. (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department of Financial Services would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law,

is one of the most important things that government can do to ameliorate the impact of the crisis.

Please contact Rose Marie Cantanno at rmcantanno@nylag.org with any questions.

# Long Island Housing Services, Inc.

640 Johnson Avenue, Suite 8, Bohemia, New York 11716-2624
Suffolk: 631-567-5111 ~ Nassau: 516-292-0400 ~ Fax: 631-567-0160
www.LIFairHousing.org
*Protecting Civil Rights for Long Islanders since 1969*


Long Island celebrates the 50th Anniversary of the Fair Housing Act



## MEMORANDUM IN SUPPORT

**A.10851/S.8789**

**August 19, 2020**

**BILL NUMBER:** A.10851/ S.8789

**SPONSORS:** Assembly Member Dinowitz/Senator Kavanagh

**TITLE OF BILL**: AN ACT to amend Section 595-b of the Banking Law

**SUMMARY OF BILL**: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

**STATEMENT REGARDING THE BILL**: Long Island Housing Services, Inc. ("LIHS") strongly supports A.10851/S. 8789, which would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

LIHS is a is a private, not-for-profit 501(c)(3) corporation, and Long Island's only private fair housing advocacy and enforcement agency serving Nassau and Suffolk counties. LIHS's mission is the elimination of unlawful housing discrimination and promotion of decent and affordable housing through advocacy and education. Our founding objectives are to promote racial and economic integration and equal housing opportunity throughout Long Island, to reduce and eliminate unlawful housing discrimination, to encourage the development of low-income and affordable housing, and to educate and assist the public regarding housing rights and opportunities in the region. As part of our efforts to meet these objectives, LIHS provides housing counseling and legal services to homeowners facing mortgage default and foreclosure.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income and are facing the prospect of not being able to pay their mortgages and the risk of the loss of their homes to foreclosure. Such homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored

programs enacted in the wake of the pandemic, or they might seek a loan modification or other relief from the lender in order to avoid loss of their homes to foreclosure. This process is known as "loss mitigation."

In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq*. (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department of Financial Services would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for enforcement of New York's servicing is all the more important in the current climate, in which federal regulators have been abdicating their consumer protection obligations. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law, is one of the most important things that government can do to ameliorate the impact of the crisis.

***Please contact Trina Kokalis at trinakokalis@lifairhousing.org or 631-567-5111 ext. 325 with any questions.***

Empire Justice Center
119 Washington Ave. ◆ Albany, NY 12210
Phone 518.462.6831 ◆ Fax 518.462.6687
www.empirejustice.org

# Memorandum in Support

**Protections for Homeowners in Foreclosure**
**A.10851 (Dinowitz)/S.8789(Kavanaugh)**

Empire Justice Center strongly supports A.10851(Dinowitz)/S.8789(Kavanaugh) which instills added protections for New York State homeowners in default and foreclosure. The bill provides a private right of action for homeowners against mortgage servicers who violate New York State's longstanding mortgage servicing regulations.

Pursuant to Section 595-b of the Banking Law, the Department of Financial Services (DFS) promulgated detailed regulations governing the business of mortgage servicing in New York State. These regulations cover the basic conduct of mortgage loan servicers and instill critical consumer protections for New York mortgage borrowers. These detailed rules cover the whole range of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, excessive fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq*. (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action where a violation of RESPA has occurred, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms who represent them in foreclosure actions, who can without concern rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This conspicuous absence of an enforcement mechanism would be remedied by this bill, by specifying that the violation of mortgage servicing regulations promulgated by the DFS would be enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable. This bill provides that any person who has been injured by reason of any violation of any such rules may bring an action in his or her own name; assert a counterclaim in a defense of a foreclosure, or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

Further ensuring compliance with the rules, no foreclosure action can be commenced before the compliance is confirmed. It would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have attempted in order to avoid other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

We anticipate that New York State will be facing a foreclosure crisis equal to was followed the subprime lending crisis and the great recession of a decade ago, if not greater. Over thirty percent of New York homeowners reported missing a mortgage payment recently. While New York fortunately has strong consumer protections for homeowners such as the mandatory settlement conferences that must be held in every residential foreclosure on a home loan, these settlement conferences have often consumed with ensuring mortgage servicers are complying with the DFS business conduct rules. Instilling a private right of action and mandating compliance as a condition precedent not only instills fairness for homeowners but it should also instill efficiency into the judicial settlement conferences.

Empire Justice Center strongly supports A.10851/S. 8789, which will provide critical protections for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

This memorandum was prepared by:
Jim Dukette **jdukette@empirejustice.org**
Kirsten Keefe **kkeefe@empirejustice.org**