WHAT IS THE DURATION OF THE 90-DAY NOTICE – AND WHY DOES IT MATTER?

By: Bruce J. Bergman*
and Peter Sullivan†

That holders of defaulted mortgages are beset with problems and a surfeit of statutory roadblocks to prosecuting foreclosure actions is hardly a cause for widespread sympathy. Nor is there any outcry to rescue lenders facing foreclosure durations of three and four years, with the resultant accrual of interest, costs and protective advances for insurance and taxes, then rendering losses as certain. Nonetheless, it may be reasonable to urge that there should still not be confusion or uncertainty interpreting foreclosure statutes in such a way as to impose yet further detainment.

A particular case in point is RPAPL §1304, which requires that where the subject is a home loan[1], a certain ninety day notice must be sent to the borrower before a foreclosure action can begin. This notice mandate has been widely discussed and its details need not be further explored here.[2]

But there is an aspect of the ninety day imperative which does merit remedial analysis, RPAPL §1304(4), which provides that:

> "The notice and the ninety day period required by subdivision one of this section need only be provided once in a twelve month period to the same borrower in connection with the same loan."

What this means was immediately manifest to experienced practitioners and represented a welcome avoidance by the legislature of abusive borrower shell games. When the ninety day notice is sent, should the borrower cure the default, as in remitting the sums in arrears for example, then of course the mortgage is reinstated. If, however, a month thereafter the borrower defaults again, the mortgage holder need not send a new ninety day notice as a prerequisite to foreclosure. This then averts the bizarre exercise of a default followed by a ninety day hiatus, followed by cure, then another notice with concomitant three month delay, all repeated *ad nauseam*. Such a scenario would effectively change the payment requirements of the mortgage loan and permit wily borrowers to constantly, indeed interminably, postpone payment obligations.

So, any subsequent default within a year does not elicit a notice obligation. If, however, the borrower has cured and more than a year has passed, then it is simply a new situation and a notice would be required.

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* Bruce J. Bergman, a partner with Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. of Garden City, is the author of the four-volume treatise, *Berman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender (rev. 2013).
† Peter Sullivan is a partner with Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. of Garden City in the Litigation Department.

This is quite different, though, from saying that if a year has gone by and the borrower has ignored the notice, the mortgage holder is obliged to send the notice yet again in order to initiate a foreclosure. The statute does not say that, although it readily could have done so. In other words, a ninety day notice never cured does not lose its efficacy merely with the passage of time.

Nevertheless, there is some prevailing view in the wind that if a foreclosure is not begun within a year of the notice, initiating the action is barred unless a new ninety day notice is sent and has expired. Indeed, the Department of Financial Services takes this position, in a desultory fashion. The issue of this subdivision, however, has never been interpreted by the courts.

While it might be surmised that mortgage holders would surely institute their home loan foreclosures the moment the ninety days expired, there are any number of circumstances which can impede such exactitude, a few among them: (a) difficulties in obtaining information to support the now cancelled attorney affirmation required by Administrative Order 548/10, as amended by AO 431/11 or by the new certificate of merit obligation of CPLR §3012-b; (b) governmental imposition of rules or suits as to the foreclosure process; (c) compelling pressures to settle or compromise mortgage defaults.

Faced with such demands and impositions, some foreclosure actions may just not be ready for more than a year after the notice has expired. Must the now poised mortgage holder first send a new notice and wait yet another ninety days, or is it free to proceed? We posit here that the second path is correct, because:

- The legislature could readily have stated that the notice expired after one year, but did not do so.

- The statute is not ambiguous and statutory construction dictates that it must be interpreted as written.

- This is required as well because the statute is in derogation of the common law.

- The Department of Financial Services posture does not have the force of law.

- The statute's bill jacket offers no interpretation that a ninety day notice expires after one year.

On its website, the Department of Financial Services provides the instructions for the filing of the 90-day Pre-foreclosure Notice and also provides "Guide to the Pre-foreclosure Information Form", and purports to answer questions concerning the 90-day Notice:

> "7. After receiving a 90-day pre-foreclosure notice, a borrower cured the default and foreclosure proceedings were halted. A few months later, the borrower defaulted again. Does the lender/servicer need to send a new 90-day Pre-Foreclosure Notice and file information on that new notice with the Banking Department? [Note: the question posed does not address the issue here presented.]
> RPAPL §1304(4) states that a 90-day pre-foreclosure notice must be given to the borrower only once in a 12-month period. Consequently, if the borrower *re-defaults within 12 months* of the mailing of the *first* 90-day pre-foreclosure notice, the lender or servicer may choose to, but is not required to, send another 90-day pre-foreclosure notice prior to filing a list pendens and commencing a foreclosure action *within that 12-month period. After the expiration of the 12-month period, a new 90-day pre-foreclosure notice must be mailed to the borrower prior to filing a lis pendens and commencing a foreclosure action even if the re-default occurs within the 12-month period..."*

The Superintendent's answer neither mentions nor offers any advice where there has been no attempt to cure and no dialogue between the bank/mortgagee, where the mortgagor continues unabated in default after the mailing of the ninety day notice, and the one year thereafter and ninety day period.

The fact that some practitioners and the Superintendent have liberally interpreted §1304 hardly renders ambiguous the straightforward language of the statute.[3] It is not determinative that the Superintendent appears to disagree. "[A]n administrative agency's interpretation of a regulation... is 'not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court[s].'"[4] An agency may not ignore or change the clear language of the statute and regulations without formal amendment.[5] If the interpretation of a regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.[6]

Legislative enactments (even if remedial) in derogation of common law must be strictly construed.[7] RPAPL §1304 limits a mortgage holder's right to commence an action to foreclose on its mortgage. The courts have made clear: statutes limiting the right to sue are in derogation of the common law and must be strictly construed in favor of the aggrieved party and proposed Plaintiff.[8] It is well established that the foreclosure provisions of RPAPL Article 13 must be strictly construed in favor of the foreclosing mortgagee because the statute is in derogation of a plaintiff's/mortgagee's common-law right to commence an action in foreclosure and to recover the mortgage debt.[9]

The rule must be observed that in construing a statute "the common law must be held no further abrogated that the clear import of the language used in the statutes absolutely requires", for the mischief to be remedied[10] "[Where the] conduct which is sought by the force of [a]...statute to condemn [what]...heretofore had the sanction of

the law...it is a familiar canon of construction that an intention to change the rule of the common law will not be presumed from doubtful provisions, and the presumption is that no such change was intended, unless the enactment is clear and explicit in that direction...[11] "When a statute merely gives a new remedy, without any negative expressed or implied, the old remedy is not taken away, and the party may have his election between the two.[12]

Thus, it must be presumed that, in crafting RPAPL §1304, the Legislature was aware of the common law. Not having mentioned the need for a second ninety day notice as a pre-condition to the commencement of a foreclosure action after the passage of twelve months and ninety days, it did not intent to make such a condition to suit. "[A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact."[13]

One would assume, therefore, that where the borrower does not respond at all to an RPAPL §1304 pre-foreclosure notice, no second notice is required, even if the foreclosure action is commenced more than a year and ninety days later. Aside from the doctrine of mandatory strict construction, the standard rules of statutory construction also support this conclusion.

The provisions of RPAPL §1304 are unambiguous. "Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute.[14] The statute should be construed so as to give effect to the plain meaning of the words used."[15]

"A statute must be read and given effect as it is written by the Legislature and not as the court may think it should or would have been written if the Legislature had envisioned every problem or complication which might arise in the course of its administration."[16] The "court[s] must take the statute as it finds it and construe it according to the canons of interpretation, neither extending its operation beyond the bounds of legislative intent..."[17]

"Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."[18] This is particularly true where, as here, the doctrine of *expressio unius est exclusio alterius* applies.[19]

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[1] *Auerbach v Bd. of Educ.*, 204 A.D.2d 85, 86, 611 N.Y.S.2d 536, 537 (1st Dept. 1994), *affd.*, 86 N.Y.2d 198, 654 N.E.2d 972, 630 N.Y.S.2d 698 (1995).

[2] *Matter of Baker v. Town of Islip Zoning Bd. of Appeals,* 20 A.D.3d 522, 523-524, 799 N.Y.S.2d 541 (2d Dept. 2005), *lv. den.* 6 N.Y.3d 701, 843 N.E.2d 1155, 810 N.Y.S.2d 415 (2005).

[3] *Hernandez on Behalf of Hernandez v. Blum*, 61 N.Y.2d 506, 512 , 474 N.Y.S.2d 711, 713 (1984).

[4] *Kurcsics v. Merchants Mut. Ins. Co.,* 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980).

[5] *Vucetovic v. Epsom Downs, Inc.,* 10 N.Y.3d 517, 521, 890 N.E.2d 191, 860 N.Y.S.2d 429 (2008).

[6] *McKinney's Consol. Statutes and Statutory Construction*, Book 1, §142, and cases cited.

[7] *Psota v. Long Island R. Co.*, 246 N. Y. 388, 393, 159 N. E. 180, 62 A. L. R. 1163 (1927); *Dean v. Metropolitan El. Ry. Co.*, 119 N. Y. 540, 547, 23 N. E. 1054 (1890).

[8] *Dollar Dry Dock Bank v. Piping Rock Builders, Inc.*, 181 A.D.2d 709, 710, 581 N.Y.S.2d 361, 363 (2d Dept. 1992); *Val. Sav. Bank v. Rose*, 228 A.D.2d 666, 667, 646 N.Y.S.2d 349, 350 (2d Dept. 1996).

[9] *Kemp v Rockland Leasing, Inc.*, 51 Misc.2d 1073, 1074, 274 N.Y.S.2d 952, 954 (Sup. Ct. 1966); *Bertles v. Nunan*, 92 N.Y.152, Abb. N. Cas. 283, 293, 47 Sickels 152 (1883).

[10] *In Re Charles S.*, 60 A.D.3d 954, 955, 875 N.Y.S.2d 263, 264 (2d Dept. 2009)(cases cited); *People v. Phyfe*, 136 N.Y.554, 558-59, 91 Sickels 554 (1893); *People v. Palmer*, 109 N.Y.110, 118, 16 N.Y.529, 532, 64 Sickels 110 (1888).

[11] *Bender v. Jamaica Hosp.*, 40 N.Y.2d 560, 561B562, 388 N.Y.S.2d 269 (1976); *Doctors Council v. New York City Employees' Retirement Sys.*, 71 N.Y.2d 669, 674, 525 N.E.2d 454, 529 N.Y.S.2d 732, 735 (1988).

[12] *Matter of Auerbach v. Board of Educ.*, 86 N.Y.2d 198, 204, 654 N.E.2d 972, 630 N.Y.S.2d 698 (1995).

[13] *Bailey v. Joy*, 11 Misc.3d 941, 945, 810 N.Y.S.2d 644, 648 (Sup. Ct. 2006), citing to *McKinney's Cons. Laws of N.Y.*, Book 1, Statutes §73, at 148.

[14] *Id.*

[15] *Bailey v. Joy, supra.*

[16] *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 966, 583, 673 N.Y.S.2d 966 (1998).

[17] *Raynor v. Landmark Chrysler,* 18 N.Y.3d 48, 56, 959 N.E.2d 1011, 936 N.Y.S.2d 63, 67 (2011).

[18] *Bailey v. Joy, supra.*, 11 Misc.3d at 945-46, 810 N.Y.S.2d at 648; *See and compare, Bd. of Directors of House Beautiful at Woodbury Homeowners Ass'n, Inc. v. Godt*, 96 A.D.3d 983, 984-85, 947 N.Y.S.2d 572, 573-74 (2d Dept. 2012).

[19] *Bailey v Joy, supra*; McKinney's Cons. Law of N.Y., Book 1, Statutes §240, at 411; *Presbyterian Hosp. v. Maryland Cas. Co.,* 90 N.Y.2d 274, 284, 683 N.E,2d 1, 660 N.Y.S.2d 536 (1997); *Pajak v. Pajak,* 56 N.Y.2d 394, 397-98, 437 N.E.2d 1138, 452 N.Y.S.2d 381 (1982); *Jairy R. v Jeffrey H.*, 34 Misc.3d 448, 454-55, 934 N.Y.S.2d 688, 693 (Fam. Ct., 2011), quoting, *People v. Finnegan,* 85 N.Y.2d 53, 58, 647 N.E.2d 758, 623 N.Y.S.2d 546 (1995).