

Latest Ruling on NY Foreclosure Law Limits Path for Broad Constitutional Challenges, Practitioners Say

Recent decisions have strengthened the Foreclosure Abuse Protection Act's legal footing, though some foreclosure attorneys say narrower constitutional challenges remain possible.

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A federal judge's recent dismissal of another challenge to New York's Foreclosure Abuse Prevention Act added to a growing body of decisions upholding the controversial statute that reshaped the state's foreclosure landscape and triggered years of litigation from lenders and mortgage investors.

U.S. District Judge Mae D'Agostino of the Northern District of New York rejected claims brought by mortgage investor Brougham Trust I Fund on Sept. 8, concluding the action could not proceed against the state officials named as defendants.

The ruling largely turned on sovereign immunity and jurisdictional issues, while also finding amendment would be futile in light of existing precedent.

Enacted in 2022, FAPA reshaped New York foreclosure litigation by restricting lenders' ability to revive older mortgage claims, prompting years of appellate litigation over the law's retroactive reach and constitutional validity.

The law generated years of litigation as courts worked through its retroactive application to thousands of existing foreclosure actions.

D'Agostino's decision marked another setback for lenders seeking to invalidate FAPA, which prevents mortgage holders from repeatedly reviving otherwise time-barred claims.

Supporters of the statute have argued that FAPA restored finality to foreclosure litigation and stopped lenders from manipulating statutes of limitation.

Opponents have contended that its retroactive application improperly extinguishes existing mortgage rights and unsettles longstanding expectations in the secondary mortgage market.

Anthony Filosa, a partner in Rosenberg Fortuna Filosa & Laitman, who represents parties in pending FAPA litigation before the U.S. Court of Appeals for the Second Circuit, said the ruling fits comfortably within a broader trend.

"Judge D'Agostino's decision is the latest in a consistent line of rulings upholding FAPA against constitutional challenge," Filosa told Law.com.

Filosa pointed to the Court of Appeals' decisions in *Article 13 LLC v. Ponce De Leon Fed. Bank* and *Van Dyke v. U.S. Bank, Nat'l Ass'n*, along with the Second Circuit's *Article 13* ruling, as increasingly solidifying the legal foundation underpinning the statute.

"The New York Court of Appeals decided the state constitutional questions in *Article 13* and *Van Dyke*, and those rulings are final," Filosa said.

He also noted that the Second Circuit still must decide *East Fork Funding v. U.S. Bank*, but argued that the Court of Appeals has already rejected constitutional challenges to the voluntary-discontinuance provision at issue there.

According to Filosa, the district court's reliance on *Article 13* when addressing amendment underscores the breadth of that precedent.

"The Northern District of New York's reliance on *Article 13* to find amendment futile, even after deciding the case on sovereign immunity, shows how broadly that reasoning is being read," he said.

However, not everyone sees the ruling as the final word on constitutional challenges to the statute.

Adam Swanson, a partner in McCarter & English, characterized the decision primarily as a procedural ruling and said it highlights the difficulties of mounting a broad federal challenge to a law that is generally applied by state court judges in individual foreclosure actions.

"The decision is largely jurisdictional and highlights one of the constraints of a 1983 action, which is that for effective relief there must be a state actor who can be restrained," Swanson told Law.com.

Because FAPA is principally implemented through judicial rulings rather than executive enforcement, Swanson said future challenges may need to arise through specific foreclosure cases rather than sweeping attacks on the statute itself.

"It is certainly challenging at this point, but no," Swanson said when asked whether significant constitutional challenges to FAPA are effectively foreclosed.

"The issue is that many stakeholders keep seeing the constitutional propriety of the retroactive application of FAPA as a yes or no question when, in fact, there are many shades of gray."

Swanson argued that future challenges may find more traction where FAPA is applied to particular factual situations involving vested rights or final judgments.

"There are many 'FAPA cases' out there with differing factual scenarios, and there surely are cases with facts under which the application of FAPA would likely violate the constitution," he said.

As an example, Swanson pointed to situations involving unappealable final judgments of foreclosure and sale that have not yet been enforced, suggesting retroactive application of FAPA in those circumstances could present different constitutional considerations than those addressed by courts to date.

The competing views reflect the continuing debate surrounding a law that has become one of the most consequential foreclosure reforms enacted in New York in recent years. While courts have repeatedly rejected broad challenges to FAPA, participants in the mortgage industry continue to test the boundaries of its retroactive reach, particularly in cases presenting unusual factual circumstances.

The legislation's sponsor, state Sen. James Sanders Jr., D-Queens, did not respond to requests for comment.

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