New York Mortgage Industry Facing Detrimental Industry-wide Impact in Dieudonne

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Recently, the Supreme Court of the State of New York Appellate Division, Second Department issued a decision in the case of *Bank of New York Mellon v. Dieudonne*, which significantly narrowed the statute of limitations clock to foreclosure on mortgage loans. Specifically, by applying the date of any initial foreclosure filing as the date when a mortgage loan is accelerated, instead of the date a judgment of foreclosure and sale has been entered, the court effectively disregards the main meaning of the contractual language in a standard New York mortgage that permits borrowers to reinstate their mortgages up until entry of that final judgment. This narrow reading could result in a windfall for defaulting borrowers where multiple foreclosure actions have been commenced. As such, the foreclosing plaintiff in *Dieudonne* has filed a motion for leave to appeal the Appellate Division's decision to New York's Court of Appeals.

Not only will the Second Department's decision impact the foreclosure industry, but it will likely impact the mortgage business at large, which has attracted the attention of the New York Mortgage Bankers Association, Inc. (NYMBA), a not-for-profit statewide organization devoted to the field of real estate finance. NYMBA sought the help of its member law firms to draft an amicus curiae brief in further support of plaintiff's motion for leave to appeal to the state's highest appellate court to demonstrate the far reaching impact of the *Dieudonne* decision. In fact, NYMBA engaged McGlinchey Stafford to lead drafting the group's Amicus Brief, which urges the New York State Court of Appeals to take on this case. NYMBA was moved to file its own brief, filed with the Court of Appeals on Friday, Nov. 22, based on the decision's potentially detrimental industry-wide impacts and their trickle-down effects on consumers.

The consequences of the *Dieudonne* decision extend far beyond the borrower's windfall resulting in her loan being discharged. This heightened risk of lien loss is likely to be spread across the larger consuming public. The contractual language included in New York mortgages permitting borrowers to reinstate their loans until a final judgment has been factored into the pricing of mortgage loan products. In its brief, NYMBA opines that as a result of the Court's disregard for the meaning of these standard mortgage terms, the pricing and cost of mortgages in New York will likely increase. The increased cost of mortgage could inevitably lead to mortgages becoming more expensive and potentially cost-prohibitive for consumers. Moreover, NYMBA's brief cautions that the increased risk of lien loss will also likely lead to more stringent credit qualification requirements for would-be homeowners.

Finally, and perhaps even most concerning, is that the *Dieudonne* decision could lead to mortgagees becoming more conservative in pursuing loss mitigation work-outs with defaulting borrowers. Faced with a shortened statute of limitations clock, mortgagees will focus their efforts upon proceeding to judgment as quickly as possible, so that if there are any potential defects in the foreclosure, they can find this out quickly and attempt to rectify it through a new action prior to the statute of limitations expiring. As such, engaging in any loss mitigation alternatives would result in losing precious time from the now ticking statute of limitations clock. **The unintended result of the *Dieudonne* decision is that the costs associated with delays in foreclosure actions, be it from legitimate loss mitigation efforts, court backlog, loan transfers, bankruptcies, or the like, will fall solely on lenders.**

If the current holding of the *Dieudonne* decision is left intact, it has the potential to impact the mortgage business overall, resulting in increased costs to consumers to offset the heightened risk for mortgagees. Additionally, **mortgagees will need to be extremely vigilant in commencing foreclosure actions against defaulting borrowers, ensuring that actions are timely proceeding to judgment within the statute of limitations period.**

Take-Away:
It is the hope of many involved in mortgage lending in New York that the state's Court of Appeals will decide to hear this case. Mortgage lenders in New York will want to keep an eye on updates regarding the Court's decision.

If you have questions, reach out to one of the authors of this alert or another member of the firm's Consumer Financial Services Litigation team.