



New York Bankers Association  
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New York, New York 10016

Michael P. Smith  
President & CEO

December 17, 2019

The Honorable Andrew M. Cuomo  
Governor  
State of New York  
Executive Chamber  
State Capitol  
Albany, NY 12224

**RE: Opposition of S.5160 (Kavanagh)/ A.5619 (Weinstein)**

Dear Governor Cuomo:

The New York Bankers Association ("NYBA")<sup>1</sup> strongly opposes this legislation related to the foreclosure process in New York. Specifically, the bill would provide that any defense based on a plaintiff's lack of standing cannot be waived if a defendant fails to raise the defense in a responsive pleading or pre-answer motion. While we appreciate and join in the bill's goal of protecting vulnerable consumers from unscrupulous actors, we believe the bill may go too far and have unintended consequences for all homeowners. For the reasons set forth below, we urge that the bill be **disapproved**.

Importantly, the bill would permit mortgagors-- perhaps even years in the future-- to surface, raise a standing defense to a completed foreclosure, and seek damages against the foreclosing lender plus attempt to avoid the purchase of the property by a third party, with no legal ramifications or final deadline. This will make it near impossible to find willing purchasers of foreclosed properties, as well as title insurance on those properties. It could further leave open the potential for a prolonged time period where a property is in legal limbo and thus could chill mortgage lending as a whole, given the risk that any property- foreclosed or not- could potentially be a legal liability in perpetuity.

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<sup>1</sup> NYBA is comprised of community, regional, and large banks and thrifts across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard \$2 trillion in deposits, and extend nearly \$70 billion in home and small business loans.

In addition, this new procedural rule would only apply in foreclosure cases. Thus, the bill sets a procedure that is not available to any other defendant in any other proceeding in New York courts and further does not grant the same privilege to plaintiffs during the proceedings. Allowing foreclosure defendants, who have every opportunity to state their case at the same time as other similarly situated defendants, to sidestep the demands of every other litigant in a court in New York, is unfair, unnecessary, and undermines court process throughout the state. Beyond this, there is no comparable sidestep proposed for plaintiffs in a foreclosure matter, thus challenging the impartiality of any judicial decision handed down utilizing this process.

Furthermore, this issue was already addressed in a recent law that would require courts to advise defendants of their right to answer, the requirements of an answer, the consequences of not answering, and provide information about available resources for foreclosure prevention assistance in the first settlement conference. This legislation would provide even more advantage to a defendant, by allowing a defendant to withhold a defense until after a mandatory settlement conference (or conferences). This will actually allow the defendant to gain insight into facts and strategy of the plaintiff that would otherwise not be available prior to the currently mandated timing of such defenses. This presents an unfair advantage to defendants and would certainly raise questions as to the integrity of the process as well.

Finally, it is important to note that the foreclosure issues in New York have been improving since the immediate aftermath of the financial crisis. In March 2019, the Office of the New York State Comptroller (OSC) issued a report finding that statewide, foreclosure filings fell by 46 percent between 2013 and 2018, and that the foreclosure rate has also fallen in every part of the State. In the report, OSC points to several recent pieces of legislation and court process changes that have helped in efforts to help manage vacant and abandoned properties, including land banks, the Vacant and Abandoned Property Database, expedited foreclosures for such properties, and the NYS Community Restoration Fund. Many of these were only enacted or expanded in 2016 and there is already improvement. While there are always ways to improve upon this success, it should be done in a careful and thoughtful manner so that unintended consequences are not the result.

For these reasons, the New York Bankers Association strongly opposes this legislation and urges that it be **disapproved**.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael P. Smith".

Michael P. Smith

cc: Niall O'Hegarty, Esq.  
Robyn Adair, Esq.