



COMMERCIAL DIVISION UPDATE

Expert Analysis

Limitations on Chief Administrative Judge's Rule-Making Authority

On Oct. 20, 2010, the Chief Administrative Judge of the State of New York issued Administrative Order #548-10, which requires foreclosing lenders to submit affirmations confirming the accuracy of their pleadings. In a recent mortgage foreclosure action, the Suffolk County Commercial Division has ruled that this Administrative Order is “void as impermissible invasion[] into the province of the Legislature.”¹

In *LaSalle Bank, NA v. Pace*, 2011 WL 723555 (Suffolk Co. 2011), Justice Thomas Whelan rejected defendants' argument that plaintiff lender's failure to submit the affirmations required by the Administrative Order was a bar to plaintiff's motion for summary judgment.² While recognizing the Chief Administrator's authority to create rules for the “efficient and orderly transaction of business in the trial courts,” the court found that the Administrative Order requiring attorney affirmations “verify[ing] the accuracy of documents filed in support of residential foreclosure actions” imposed new substantive requirements upon plaintiff for which there was no legislative delegation of authority.³

Rule-Making Authority

Regulation of the jurisdiction and proceedings of the New York state courts is generally vested in the state Legislature by virtue of Article VI of the New York State Constitution.⁴ The Chief Administrator, however, has limited authority independent of the Legislature to issue rules governing the practice and procedure of the judiciary. There are two fundamental sources of that authority.

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First, the Chief Administrator's rule-making power comes from authority that the Legislature may delegate to the Chief Administrator over the practice and procedure of the courts,⁵ a power the Chief Administrator may exercise only with the advice and consent of the Administrative Board of the courts.⁶ In exercising this delegation authority, the Legislature has granted the Chief Administrator the power to “adopt rules and orders regulating practice in the courts as authorized by statute... in accordance with the provisions of section thirty of article six of the constitution.”⁷

A split has emerged at the state trial court level on enforceability of an administrative order that requires foreclosing lenders to submit affirmations confirming the accuracy of their pleadings.

Second, the Chief Administrator's rule-making power comes from authority delegated by the Chief Judge of the Court of Appeals. Article VI Section 28 of the New York Constitution authorizes the Chief Administrator on behalf of the Chief Judge to “supervise the administration and operation of the unified court system,” and exercise other such powers as are conferred to the Chief Judge by law. The Chief Judge is empowered by the Legislature to establish standards and policies for the implementation of rules and orders regulating the practice and procedure of the courts. The

powers delegated to the Chief Administrator also include the power to “adopt administrative rules for the efficient and orderly transaction of business in the trial courts, including but not limited to, calendar practice.”⁸

Courts have construed the powers delegated to the Chief Judge, and thereby the Chief Administrator, as being quite broad because they are conferred by the Constitution, and therefore are not subject to the powers to regulate the courts reserved to the Legislature under Section 30 of the Constitution.⁹ This does not mean, however, that the powers conferred to the Chief Administrator by Section 28 are limitless. Indeed, in exercising these powers, the Chief Judge and Chief Administrator “cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person and property.”¹⁰ Or to put it another way, this rule-making authority “cannot significantly affect the legal relationship between litigating parties, the imposition of additional matters that impair statutory remedies or enlarge or abridge rights conferred by statute[s].”¹¹

Purpose and History of Order

The Chief Administrator issued Administrative Order #548-10 in response to widespread and well-publicized inadequacies in mortgage foreclosure filings. By the fall of 2010, a number of instances became publicized where lenders in foreclosure actions were filing forged or falsely signed documents. In response, in addition to commencing civil and criminal investigations, state and federal governments instituted more stringent pleading requirements for residential mortgage foreclosure actions,¹² including Administrative Order #548-10.

The Administrative Order mandates that certain affirmations be filed in any residential mortgage foreclosure.¹³ The order requires that counsel for a foreclosing lender personally inquire into

the factual accuracy of the allegations in the complaint, and further that a representative of the plaintiff affirm to the accuracy of the underlying documents.¹⁴ The Chief Administrator purportedly promulgated this rule pursuant to authority given to the Chief Administrator by the Chief Judge.¹⁵

'LaSalle Bank, NA v. Pace'

The lawsuit at issue grew out of a mortgage loan allegedly made by Washington Mutual Bank to James and Linda Pace in October 2006.¹⁶ The loan was in the amount of \$1.3 million for a property in Hampton Bays, N.Y.¹⁷ The loan went into default and was later assigned to LaSalle Bank in April 2008.¹⁸ Soon after assignment, LaSalle brought this foreclosure action and moved for summary judgment.¹⁹ In opposing summary judgment, the defendants argued that plaintiff had failed to submit the affirmations required by the Administrative Order, and therefore summary judgment must be denied.²⁰

In addressing this argument, Justice Whelan began by noting that, once a judicial proceeding has commenced, a trial court has exclusive jurisdiction over it, which entitles the court to "adjudicate all issues presented to him or her, including... issues raised on motions."²¹ Included in that jurisdiction, the court found, is establishing the reception of evidence and determining the sufficiency of proof.

The court then turned to the Administrative Order and the amendment of 22 NYCRR 202.12-a effectuating it. Section 202.12-a governs residential foreclosure actions and, as set forth in the recently adopted subsection (f), "[t]he Chief Administrator of the Courts may continue to require counsel to file affidavits or affirmations confirming the scope of inquiry and the accuracy of papers filed in residential mortgage foreclosure actions."²²

The court found that the Administrative Order was "legislative" in nature because it does more than regulate the practice and procedure of the courts.²³ The court examined the Administrative Order and Section 202.12-a(f) and found that "even upon a most cursory review of their terms, ... they impose additional substantive requirements upon a plaintiff seeking the remedy of foreclosure that is not contemplated by the statutes which now regulate foreclosure actions."²⁴ Since the Administrative Order was "legislative" in nature by imposing substantive requirements upon the plaintiff, the court ruled it is not enforceable.

The court continued by noting that, to constitute a valid regulation of practice and procedure, rules propagated by the Chief Administrator "must arise from an express statutory or other legislative delegation."²⁵ The court found that no such delegation had been made to the Chief Administrator allowing the

imposition of "substantive requirements that touch upon the nature and sufficiency of proof."²⁶ The court did find some support in Section 10-a of the Laws of 2009 to support the proposition that the Chief Administrator may adopt substantive rules in regards to settlement conferences, but that was inapplicable to the case at hand.²⁷

Next, the court examined the number of ways in which the Administrative Order and Section 202.12-a(f) "significantly affect the legal relationship between the parties."²⁸ The court found that these new requirements both impose additional burdens of proof and impair the statutory remedy of foreclosure and sale. The evidence of this impairment, the court found, is clear from the vast decrease in the number of foreclosure actions filed, and the "resounding halt in the prosecution of [pending] foreclosure actions."²⁹ Taking special issue with the new requirements, the court stated that the new rules diminished the "constitutionally conferred original jurisdiction" of the court and therefore exceeded the power of the Chief Administrator's rule-making power.³⁰ The court thus granted summary judgment to the plaintiff lender.

Other Courts

Other New York trial courts have found Administrative Order #548-10 to be enforceable. In *Citimortgage Inc. v. McGee*, Justice Peter H. Mayer of the Suffolk County Supreme Court enforced the requirements of the Administrative Order requiring that the mandated affirmations must be filed in all actions pending or filed for foreclosure on a residential mortgage.³¹ That court concluded that failure to file the required documents would result in dismissal of the action. Likewise, in *Citimortgage Inc. v. Nunez*, the Kings County Supreme Court enforced the Administrative Order and, when the plaintiff in that case alleged that it was unable to comply with the new Administrative Order because it did not have procedures in place to deal with the new requirement, Justice Arthur M. Schack dismissed that foreclosure action without prejudice.³²

Conclusion

A split has now emerged at the state trial court level on the enforceability of Administrative Order #548-10. How it will be received by the appellate courts will depend largely on their perception of whether the order is within the Chief Administrator's constitutionally based authority to adopt rules and orders regulating practices in the courts. Until the appellate courts weigh in on the issue, counsel for mortgage lenders would be prudent to comply fully with its requirements.

Moreover, this issue goes well beyond Administrative Order #548-10. When dealing

with any Administrative Order, especially ones that can be read as impeding on the court's substantive decision-making ability, Supreme Court justices need to analyze thoroughly whether it is consistent with the Chief Administrative Judge's delegated rule-making authority.



1. *LaSalle Bank, NA v. Pace*, __N.Y.S.2d__, 2011 WL 723555 (Suffolk Co. 2011).
2. *Id.* at *2.
3. *Id.* at *2, 5.
4. N.Y. Const. Art. VI §30.
5. *Id.*
6. *Id.*
7. N.Y. Judiciary Law §212(2)(d).
8. 22 NYCRR 80.1(b)(6).
9. *LaSalle*, 2011 WL 723555, at *4.
10. *People v. Ramos*, 85 N.Y. 678, 687, 651 N.E.2d 895, 901 (1995) (internal quotations & citations omitted).
11. *LaSalle*, 2011 WL 723555, at *4.
12. Scott J. Paltrow, "Legal woes mount for a foreclosure kingpin," REUTERS, <http://www.reuters.com/article/2010/12/06/us-foreclosures-lps-idUSTRE6B547N20101206>.
13. Administrative Order 431/11, http://www.courts.state.ny.us/attorneys/pdfs/AdminOrder_2010_10_20.pdf (Administrative Order 431/11 replaced Administrative Order 548/10).
14. *Id.*
15. *Id.*
16. Plaintiff's Mem. of Law dated May 12, 2010 at 2.
17. *Id.*
18. *Id.*
19. *Id.*
20. Defendant's Aff. dated Jan. 21, 2011, at ¶63-67.
21. *LaSalle*, 2011 WL 723555, at *4.
22. 22 NYCRR 202.12-a(f).
23. *LaSalle*, 2011 WL 723555, at *3.
24. *Id.* at *5.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at *6.
29. *Id.*
30. *Id.*
31. *Citimortgage Inc. v. McGee*, 915 N.Y.S.2d 436 (Suffolk Co. 2010).
32. *Citimortgage Inc. v. Nunez*, No. 2558/09, 2010 WL 5092865 (Kings Co. Dec. 13, 2010).