CONSTITUTIONAL/CIVIL RIGHTS

8th Amendment Excessive Fines Clause — Timbs v. Indiana

By Cory Morris

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Unlike other forms of punishment that impose costs on government, fines create revenue[1]. Until *Timbs v. Indiana*, 138 S. Ct. 2650 (2018) ("*Timbs*"), the Supreme Court of the United States ("Supreme Court") "never . . . decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause."[2]

While all 50 states have a prohibition against the imposition of excessive fines, *Timbs* is characterized as "a sweeping ruling that strengthens property rights and could limit controversial police seizures, such as those done through civil forfeiture, nationwide."[3] Its application to the states in *Timbs*, like Supreme Court Decisions such as *Mapp v. Ohio* (4th Amendment) and *McDonald v. City of Chicago* (2nd Amendment), should reverberate the message that states cannot police for profit and unconstitutional governmental fines and seizures will be challenged.

Petitioner Tyson Timbs was a first-time offender suspected of a drug sale. After "Timbs . . . pleaded guilty . . . Indiana moved to forfeit the car he was driving when he was arrested: a $42,000 Land Rover, which he had bought with money from his father's life insurance policy."[4] In addition to a punishment and the fines Tyson Timbs paid, Indiana utilized civil forfeiture after the guilty plea to obtain the car; however, as noted by others, "[v]ery often, law enforcement will seize assets of the accused without an actual conviction." The seizure of vehicles prior to conviction is nearly a daily occurrence in neighboring Nassau County, New York. Additionally, the Suffolk County District Attorney's Office was recently the subject of local news concerning the use of asset forfeiture money in awarding bonuses rather than compensating tax payers.

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The Excessive Fines Clause was taken verbatim from the English Bill of Rights of 1689. "One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."[5] The Supreme Court in *Browning-Ferris* observed that "that the [Excessive Fines] Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct." The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, `as punishment for some offense.'"[6] This "notion of punishment . . . cuts across the division between the civil and the criminal law."[7]

The Cruel and Unusual Punishment Clause prevents the imposition of a punishment which is "grossly disproportionate" to the crime committed. Three factors are relevant to this inquiry: the inherent gravity of the offense; the sentences imposed for similarly grave offenses in the same jurisdiction; and sentences imposed for the same crime in other jurisdictions.[8] The Supreme Court in *Browning-Ferris* has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use the civil courts to extract large payments or forfeitures for the purpose of raising revenue." The Supreme Court in *Browning-Ferris* has explained that "the word 'fine' . . . mean[s] a payment to a sovereign as punishment for some offense." "The Excessive Fines Clause thus `limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'"[9]

Therefore, the first question in an excessive fines case is whether the fine at issue is punishment. The second step of the excessive fine inquiry is whether the fine is in fact excessive. The Supreme Court in *Bajakajian* has explained that a fine imposed

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REAL PROPERTY

Ever-Evolving Statute of Limitations Analysis in Mortgage Foreclosure Actions

By Justin F. Pane

This is part 1 of a series.

Pursuant to CPLR 213 (4), an action to foreclose a mortgage is subject to a six-year statute of limitations period. While the statute has remained unchanged since 1962, the Great Recession of 2008 produced a flood of residential mortgage foreclosure actions which now, 10 years later, forces the statute to be analyzed and reanalyzed so often that nearly every month New York's appellate divisions issue new opinions and interpretations concerning the statute — with each new opinion invariably adding novel (and sometimes diverging) twists to the statute's application.

On the basic fundamental principles underlying the statute of limitations applicable to mortgage foreclosure actions, all four appellate divisions agree that its purpose is fairness to a defendant and that "[w]ith respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt."[1]

Outside of the foregoing agreed upon fundamentals, each new appellate opinion issued concerning the statute of limitations period applicable to mortgage foreclosure actions can generally be characterized one of two ways — i.e., as either providing "more clarity" or "less clarity" to the issue.

The focus of part one of this two-part series concerning the ever-evolving statute of limitations analysis applied to mortgage foreclosure actions is upon recent appellate opinions having fostered uniformity of the law and bringing more clarity to the complex and nuanced nature of these type of cases. In turn, part two of this series will cover several splits currently existing between the appellate divisions on critical mortgage foreclosure statute of limitations issues which, of course, without resolution of these issues by the Court of Appeals, leaves the lower courts and its practitioners with "less clarity" on the issues.

Justin F. Pane

More clarity

Starting on a positive note, on March 13, 2019, in the matter of *Bank of N.Y. Mellon v Dieudonne*,[2] the Second Department finally addressed (and answered) a statute of limitations question of law that has nagged and divided lower courts throughout the state since April 3, 2017 — i.e., the date Honorable Thomas F. Whelan, J.S.C., rendered his scholarly, but controversial, *Nationstar Mtge., LLC v MacPherson* opinion.[3] By way of background, in *MacPherson*, Justice Whelan held that when paragraphs 19 and 22 of the standard Fannie Mae/Freddie Mac form mortgage (uniform instrument form 3033) are read together, they collectively establish that a lender is effectively precluded from accelerating the maturity of the mortgage and calling the entire sum secured thereby immediately due and payable in full, until/unless a judgment is entered.[4] Justice Whelan's well formulated and persuasive theory regarding a lender's inability to accelerate a mortgage loan (even through the filing of a foreclosure action) before the entry of a judgment created a rift of diverging and inconsistent case law throughout the lower courts of New York.[5] Thankfully, this rift was mended the unanimous opinion penned by Associate Justice Robert J. Miller in the matter of *Bank of N.Y. Mellon v Dieudonne*, wherein the Second Department declared, under no uncertain terms, that (i) entry of a judgment is not a condition precedent to the acceleration of a standard Fannie Mae/Freddie Mac form mortgage, (ii) acceleration of the same form mortgage may very well be accomplished by commencement of a foreclosure action, and (iii) *MacPherson* and its progeny are to no longer be followed.[6]

Additionally, in *Milone v US Bank N.A.*[7], the Second Department was able to not only resolve the pivotal, but previously unanswered, question of what is required of a lender to effectively "de-accelerate" a previously accelerated mortgage (i.e., standing and unequivocal notice), but the Court also outlined a general rubric for the lower courts to follow in determining the sufficiency and effectiveness of a lender's efforts to decelerate a mortgage loan, going so far as to provide specific examples of what kind of language and types of evidence the courts may accept or should be wary of when assessing the validity of an alleged deceleration event.[8]

Rounding out the frequently litigated issues concerning the "de-acceleration" of a mortgage loan, the Second Department has now also established through a series of opinions that a lender's voluntary discontinuance of a mortgage foreclosure action cannot be deemed an affirmative act revoking the loan's acceleration of the entirety of the sum due thereunder, as set forth and demanded in the underlying foreclosure complaint, unless the discontinuance papers (e.g., stipulation or motion) explicitly express (i) the lender's revocation of the acceleration, (ii) that the loan is being reinstated to a monthly installment contract, and (iii) the lender's agreement to accept regular installment payments from the borrower.[9]

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1 Freedom Mtge. Corp. v Engel, 163 AD3d 631, 632 (2d Dept 2018) (internal quotations marks & citations omitted); accord CDR Creances S.A. v Euro-American Lodging Corp., 43 AD3d 45, 51 (1st Dept 2007); Lavin v Elmakiss, 302 AD2d 638, 639 (3d Dept 2003); Wilmington Sav. Fund Socy., FSB v Gustafson, 160 AD3d 1409, 1410 (4th Dept 2018).
2 Bank of N.Y. Mellon v Dieudonne,___AD3d___, 2019 NY Slip Op 01732 (2d Dept 2019).
3 Nationstar Mtge., LLC v MacPherson, 56 Misc 3d 339 (Sup Ct, Suffolk County 2017).
4 See, MacPherson, 56 Misc 3d at 348-351.
*5 See e.g., Cypers v US Bank N.A., 2019 NY Slip Op 30549(U), *4 (Sup Ct, Westchester County 2019); Wells Fargo Bank, N.A. v Rodriguez, 62 Misc 3d 1211(A), 2019 NY Slip Op 50104(U), *2 (Sup Ct, Queens County 2019); HSBC Bank, USA, NA v Margineanu, 61 Misc 3d 973, 982-987 (Sup Ct, Suffolk County 2018) (all following MacPherson); contra e.g., Your New Home, LLC v JP Morgan Chase Bank, N.A.,___Misc 3d___, 2019 NY Slip Op 29014, *2 (Sup Ct, Westchester County 2019); Sharova v Wells Fargo Bank, N.A.,___Misc 3d___, 2019 NY Slip Op 29001, *7 (Sup Ct, Kings County 2019); U.S. Bank N.A. v Janes, 2018 NY Slip Op 33393(U), *3 (Sup Ct, NY County 2018) (all rejecting MacPherson).*
*6 Dieudonne, 2019 NY Slip Op 01732 at *3.*
7 Milone v US Bank N.A., 164 AD3d 145 (2d Dept 2018).
8 See, Milone, 164 AD3d at 153-155.
*9 See, Engel, 163 AD3d at 633; accord Bank of NY Mellon v Craig,___AD3d___, 2019 NY Slip Op 00846, *1 (2d Dept 2019); Deutsche Bank Trust Co. Ams. v Smith,___AD3d___, 2019 NY Slip Op 01562, *1 (2d Dept 2019); U.S. Bank Trust, N.A. v Aorta, 167 AD3d 807, 809 (2d Dept 2018).*

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formed;

(iii) dates on which such services were performed; and

(iv) who performed the services.

Such records are, of course, to be made available for inspection at the request of the IRS.

Rental Services

The rental services to be performed with respect to a rental real estate enterprise for purposes of satisfying the safe harbor include the following:

- advertising to rent or lease the real estate;
- negotiating and executing leases;
- verifying information contained in prospective tenant applications;
- collection of rent and payment of expenses;
- daily operation, maintenance, and repair of the property;
- management of the real estate;
- provision of services to tenants; purchase of materials; and
- supervision of employees and independent contractors.

Rental services may be performed by the individual owners (in the case of direct ownership of the real property) or by the PTE that owns the property, or by the employees, agents, and/or independent contractors of the owners.

It is important to note that hours spent by an owner or any other person with respect to the owner's capacity as an investor are not considered to be hours of service with respect to the enterprise. Thus, the proposed revenue procedure provides that the term "rental services" does not include the following:

- financial or investment management activities, such as arranging financing;
- procuring property;
- studying and reviewing financial statements or reports on operations;
- planning, managing, or constructing long-term capital improvements; or
- traveling to and from the real estate.

Real estate used by the taxpayer (including by an owner of a PTE relying on this safe harbor) as a residence for any part of the year is not eligible for the safe harbor.

Real estate rented under a triple net lease is also not eligible for the safe harbor — it more closely resembles an investment than a trade or business. For purposes of this rule, a "triple net lease" includes a lease agreement that requires the tenant to pay taxes, fees, and insurance, and to be responsible for maintenance activities for a property in addition to rent and utilities. This also includes a lease agreement that requires the tenant to pay a portion of the taxes, fees, and insurance, and to be responsible for maintenance activities allocable to the portion of the property rented by the tenant.

Procedural Requirements, Reliance

A taxpayer or PTE must include a statement attached to the return on which it claims the Section 199A deduction or passes through Section 199A information that the requirements in the revenue procedure have been satisfied. The statement must be signed by the taxpayer, or an authorized representative of an eligible taxpayer or PTE, which states:

Under penalties of perjury, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete.

The individual or individuals who execute the statement must have personal knowledge of the facts and circumstances related to the statement.

If an enterprise fails to satisfy these requirements, the rental real estate enterprise may still be treated as a trade or business for purposes of Section 199A if the enterprise otherwise meets the general definition of trade or business.

The proposed revenue procedure is proposed to apply generally to taxpayers with taxable years beginning after Dec. 31, 2017; i.e., the effective date for Section 199A.

In addition, until such time that the proposed revenue procedure is published in final form, taxpayers may use the safe harbor described in the proposed revenue procedure for purposes of determining when a rental real estate enterprise may be treated as a trade or business solely for purposes of Section 199A.

Now what?

All in all, the final regulations and the proposed safe harbor should provide some welcomed relief and "certainty" for those individual taxpayers and PTEs that own smaller rental real estate operations; and they came just in time — barely — for the preparation of these taxpayers' 2018 tax returns.

But the proof is in the pudding, or something like that, and the actual impact of the proposed safe harbor will have to await the collection and analysis of the relevant data, including the reactions of taxpayers and their advisers.

As in the case of many other taxpayer-friendly regulations or procedures, the benefit afforded requires that the taxpayer be diligent in maintaining contemporaneous, detailed records for each rental real estate enterprise. This may be a challenge for many a would-be qualified trade or business.

Whether to treat "similar" rental properties as a single enterprise may also present some difficulties for taxpayers, at least until they figure out what it means for one property to be similar to another. Based upon the term's placement in the proposed revenue procedure, it may be that all residential properties are similar to one another, just as all commercial properties are similar to one another. In that case, a taxpayer may be able to treat all of its residential rentals, for example, as a single enterprise, which may allow it to satisfy the "250 or more hours of rental service" requirements of the safe harbor.

Just as challenging may be a taxpayer's distinguishing between business-related services and investment-related services.

Regardless of how the proposed safe harbor is ultimately implemented and administered, the fact remains that the IRS has clearly considered and responded to the requests of the rental real estate industry.

The questions remain, however: Will Section 199A survive through its scheduled expiration date in 2025; and if so, will it become a "permanent" part of the code?

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Preparing Medical and Health Buildings and Facilities for Inspections and Investigations (*continued from page 9*)

kept visibly labeled and locked.

- General safety and other miscellaneous important tips. Fire extinguishers should be in place and not expired. All expired medications and products must be removed from the space. No evidence of pests should be present. No evidence of mold either in ceiling tiles or elsewhere. Cubicle curtains must be clean and appropriate. Storage should be organized. Refrigerated medications must not be contained in the same refrigerator as food items. Fix all loose flooring tiles and any holes in carpet. Corridors must be unobstructed. Exit signs must be visible. Clinical records must be appropriately secured and maintained in a locked room or cabinet. Signs should be posted indicating the confidentiality of the records. Treatment tables should be cleaned and disinfected after each use. Paper protectors replaced after each use. Proper protective clothing and identification should be worn by practitioners and staff at all times while on the premises. Overall cleanliness must be maintained.

The above is not a comprehensive guide, but rather just an informal surface overview of the topic. As of February 2019 there were 6,522 medical auditor jobs available posted on just one online job website and the field is growing constantly. Medical and other health facilities would be wise to be prepared.

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The Restored Factor: What it is and How it Can Bite Your Purchaser Client Post-Closing (*continued from page 10*)

out) with an automatic release provision.

The problems with this approach are that it eliminates finality on the closing date, which should always be the objective; and fails to contemplate the assessor's possible inaction within the agreed escrow period. The third option is an escrow held by the title company; the problems there are the title company's understandable reluctance to do so, since restored taxes are a post-policy lien; likely insistence on holding much more than the possible liability (perhaps 1-1/2 or 2 times); imposition of a justified service fee; and inability to pay the restoration without paying the *entire* tax amount, since there is no separate bill for the *restored* amount. The fourth option is for the purchasers' attorney to include contract rider language such as this:

"Supplementing the printed portion of this Contract, Seller represents and warrants that there are no real estate tax exemptions against the Premises that are subject to application of the restored factor for real estate taxes due for any period prior to Closing. If there is a restored factor applicable for real estate taxes due for any period prior to Closing, Seller shall be fully responsible for the same. If Seller or Seller's attorney receives demand therefor from Purchaser or Purchaser's attorney *within thirty (30) calendar days after Purchaser's receipt of notice of such obligation*, Seller shall promptly reimburse, indemnify and hold Purchaser harmless therefor, including any applicable interest and penalties and Seller's reasonable attorney's fees if Purchaser fails or refuses to comply with the foregoing. The provisions of this paragraph shall survive Closing."

The restored factor is a potential trap for the unwary. The onus of restored taxes will fall upon purchasers. Thus, it is imperative for purchasers' attorneys to recognize the existence of the risk of restored taxes and to react accordingly, by addressing that risk as part of the closing process.

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