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### New York Enacts Amendments to CPLR 3408, Governing Mandatory Settlement Conferences for Residential Foreclosures

In June 2016, contemporaneously with the passage of the Abandoned Property Neighborhood Relief Act, Governor Cuomo signed into legislation amendments to CPLR 3408 governing mandatory settlement conferences for New York residential foreclosure actions. The amendments include several important changes to CPLR 3408, and will become effective December 20, 2016.

#### **Codification of All Workout Options in the Settlement**

**Part:** CPLR 3408 provides that settlement conferences should "determine whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to." Although parties typically negotiate in settlement conferences about loan modifications, they may also explore other options, such as a short sale or deed in lieu of foreclosure. The amendments have codified this practice, and specifically refer to "loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation" as potential resolutions that can be explored.

**"Good Faith" Requirement Clarified:** CPLR 3408 requires the parties to negotiate in "good faith," but does not define that term. Although referees and courts consider the totality of the circumstances, the CPLR amendments codify recent case law setting forth factors to consider when evaluating whether either party has negotiated in good

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faith. For example, failure to comply with court orders and directives, or failure to comply with mortgage servicing laws and rules, constitutes bad faith. Likewise, courts may consider whether a party's conduct is consistent with efforts to reach a mutually agreeable resolution, including: avoiding unreasonable delays, appearing at settlement conferences with authority to fully dispose of the case, staying foreclosure proceedings while loss mitigation applications are pending, and providing accurate information. The amendments also codify case law that a refusal to make, or to accept, a loss mitigation offer is not sufficient to show a failure to negotiate in good faith.

The amendments also address the procedure for determining whether a party failed to negotiate in good faith and the potential consequences. Under the amendments, a referee or other staff of the settlement conference part may, on motion by a party or on their own initiative after giving notice to the parties, hold a bad faith hearing and recommend to the court whether there has been a violation of the good faith requirement. CPLR 3408 does not set forth any penalties for violating the good faith provisions, but under established case law, tolling interest and other charges may be incurred. Under the revised CPLR 3408, the court will now be required to, "at a minimum, toll the accumulation and collection of interest, costs and fees during any undue delay caused by the plaintiff." The plaintiff may also be subject to a penalty not to exceed \$25,000.00, and may be ordered to pay borrower's actual damages and fees caused by plaintiff's failure to negotiate in good faith. The court may further award any other relief it deems just and proper.

**Loan Documents Required at the Conference:** CPLR 3408 provides that plaintiffs "should" bring loan documents, payment history, payoff statements and reinstatement quotes to settlement conferences. Under the amendments, however, plaintiffs are required to bring those documents along with application forms and must advise as to potential loss mitigation options available to the borrower. If the plaintiff is not the owner of the mortgage, the name and contact information for the owner must also be available at the conference. If there is a pending loss mitigation application, the plaintiff is required to bring: (1) a summary of the status of the application, along with a list of any outstanding items; (2) an expected decision date on the application; and (3) if the application was denied, documentation setting forth the reasons for denial, including the data used in the net present value evaluation. Likewise, if the application was denied because of investor restrictions, plaintiff also must provide documents demonstrating the basis for denial (such as the pooling and servicing agreement). Borrowers in turn, will be required to provide documents at the conference deemed relevant by

the court, such as documents related to income tax returns, expenses, prior loss mitigation applications, property taxes, and proof of rental income.

**Extension of Default Deadline for Borrower's Answer to Complaint:** Under the amendments, a defaulting borrower has an additional 30 days, from the date of the initial conference, to file an answer to the foreclosure complaint.

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## Two Business Method Patents Invalidated in Texas Under *Alice*

On August 24, 2016, the United States District Court for the Eastern District of Texas - which was assigned 1,615 patent cases in 2015 - held that, under the Supreme Court's 2014 *Alice* decision, two business method patents owned by Intellectual Ventures Management LLC were directed to patent-ineligible subject matter. This opinion adds to the growing body of decisions scrutinizing business methods patents, and frequently finding them directed to abstract ideas and patent-ineligible subject matter under *Alice*.

Intellectual Ventures is a so-called "non-practicing entity" that acquired over 70,000 patents, and earned more than \$3 billion licensing them. Earlier this year, Intellectual Ventures asserted three patents against J. Crew, and, in a separate action, asserted those same patents against Florists' Transworld Delivery (FTD) in the Eastern District of Texas. These cases were consolidated by the Court. The patents at issue include U.S. Pat. No. RE32,715 (the "'715 patent"), which is entitled "System and Method for Integrating Public and Private Data," and is directed toward a system and method for allowing an internet user to create a web page that simultaneously displays public and private data on one digital screen. U.S. Pat. No. 6,782,370 (the "'370 patent") was also asserted. The '370 patent is entitled "System and Method for Providing Recommendations of Goods or Services Based on Recorded Purchasing History," and is directed to a system and method that uses a network for recommending good and services based on previous purchase history. Finally, asserted U.S. Pat. No. 5,969,324 (the "'324 patent") is entitled "Accounting Methods and Systems Using Transactional Information Associated with a Nonpredictable Bar Code," and is directed to a system and method for storing and retrieving transaction information using a nonpredictable barcode.

J. Crew moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), claiming that the asserted patents were drawn to patent-ineligible subject matter under 35 U.S.C. § 101, and

*Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). The court found the '715 and '370 patents invalid because they were directed to patent-ineligible subject matter, but also held that the '324 patent was not directed to patent-ineligible subject matter.

The Court observed that the Supreme Court has identified three exceptions to patent eligibility under § 101: laws of nature, natural phenomena and abstract ideas. See *Bilski v. Kappos*, 561 U.S. 593, 601 (2010). In *Alice*, the Supreme Court reiterated the two-step test for patent eligibility set forth in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296-97 (2012). In the first step, a court determines if the claims are directed to a law of nature, natural phenomena or abstract idea by looking at what the claims cover, and in particular, if the claims extend to cover a "fundamental . . . practice long prevalent." In the second step, the court must determine if the patent claims meet *Alice's* standard of an "inventive concept."

Applying these tests, the Court found that the '715 patent was directed toward an abstract idea of combining data from two sources for delivery to a user, and that an "inventive concept" was absent. The Court also observed that the concepts of "public data" and "private data" were "vague and uninventive." Thus, the court determined that the '715 patent was directed to patent-ineligible subject matter. Likewise, the Court found the '370 patent to be directed to the abstract idea of recommending products to customers based on purchase history, with the Court noting that "[t]he typical sales clerk at a hardware store often performs these same steps." As to an inventive step, the Court held that under *Alice*, the "mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention." By contrast, the Court found that the '324 patent was not directed to patent-ineligible subject matter, due to the combination of a non-predictable barcode with transaction information.

In the first seven months after the *Alice* decision, over 100 business method patents were invalidated, which was more than the total number of patents invalidated under 35 U.S.C. § 101 in the preceding five years. Notwithstanding, software-related patents are still being issued, and they can survive invalidity challenges - as long as they adhere to the tenets articulated by the Supreme Court in *Alice* and other decisions.

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