**To: New Jersey Law Revision Commission**

**From: Joseph Pistritto, Legislative Fellow**

 **Timothy Bott, Legislative Intern**

**Re: Retroactivity of N.J.S. 2A:50-56.1**

**Date: May 6, 2019**

**MEMORANDUM**

**Executive Summary**

In 2018, Appellate Division decided two cases concerning the issue of whether N.J.S. 2A:50-56.1, the statute of limitations provision for residential mortgage foreclosures, was retroactive to causes of action that arose prior to its enactment in 2009.[[1]](#footnote-1) In *Anim Investment Co. v. Shalhoub*, the Court held that the statute of limitations was retroactive since it was curative[[2]](#footnote-2) while in *Pfeifer v. McLaughlin* the Court found the statute could not be applied retroactively because it was *not* curative.[[3]](#footnote-3)

**Background**

***A. Anim Investment Co. v. Shalhoub***

 On September 19, 1990, the George and Kathleen Shalhoub (Defendants) executed a five-year note for $178,100 with Mortgage Electronic Registration Systems which was secured by a mortgage on Defendants’ property.[[4]](#footnote-4) The note and the mortgage were set to mature on October 1, 1995, and the mortgage was recorded on September 25, 1990.[[5]](#footnote-5) Soon after, Defendants defaulted on the mortgage and remained in default.[[6]](#footnote-6) The mortgage was assigned to Anim Investment Company (Plaintiff) on October 14, 1997, and recorded October 22, 1997.[[7]](#footnote-7)

On February 12, 2015, Plaintiff commenced a foreclosure action under the Fair Foreclosure Act in the Chancery Division.[[8]](#footnote-8) In response, Defendants argued the suit was barred under the statute of limitations pursuant to N.J.S. 2A:50-56.1.[[9]](#footnote-9) Defendants also argued that this provision was retroactive given that the statute took effect in 2009 and the actions giving rise to the suit occurred prior to that time.[[10]](#footnote-10)

The Chancery Division held that the statute met the conditions for retroactive application pursuant to New Jersey Supreme Court case law.[[11]](#footnote-11) According to the cases, the two-part test to determine whether a statute could be retroactively applied was:

1. Whether the Legislature intended to give the statute retroactive application; and
2. Whether retroactive application of that statute will result in either an unconstitutional interference with ‘vested rights’ or a ‘manifest injustice’[[12]](#footnote-12)

In elaborating on the above test, the New Jersey Supreme Court in *In re D.C.*, stated there are three situations where a statute will be retroactively applied:

1. The Legislature, either implicitly or explicitly, declares its intention to make a statute retroactive;
2. The statute was meant to be curative; and
3. The expectations of the parties requires retroactive application[[13]](#footnote-13)

The Chancery Division judge also observed that “the legislature did not specify whether the statute should be applied retroactively” and believed it was intended to be curative by providing guidance on an issue that was not previously addressed. Furthermore, it was noted that Plaintiffs had been unable to demonstrate why retroactive application would cause a manifest injustice or why Defendants’ expectations did not warrant retroactive application.[[14]](#footnote-14)

 Turning to the case before him, the Chancery Division judge observed that the mortgage would reach maturity on October 1, 1995.[[15]](#footnote-15) Given this, he applied N.J.S. 2A:50-56.1(a), the portion of the statute imposing a 6 year statute of limitations on foreclosure actions for mortgages with a fixed date of maturity, and held the suit was time-barred.[[16]](#footnote-16) Plaintiff, had it wanted to bring suit, should have filed between October 1, 1995 and October 1, 2001.[[17]](#footnote-17)

 On appeal, Plaintiff argued retroactive application of N.J.S. 2A:50-56.1(a) was in error.[[18]](#footnote-18) It claimed that the statute of limitations applicable to this case was the 20-year window outlined in *Security Nat’l Partners Ltd. P’ship v. Mahler*, 336 N.J. Super. 101 (App. Div. 2000).[[19]](#footnote-19) To hold otherwise would deprive Plaintiff of a right it had prior to enactment of the statute in 2009.[[20]](#footnote-20)

 The Appellate Division first noted that “[n]o published case has interpreted the limitations provision of N.J.S. 2A:50-56.1(a).[[21]](#footnote-21) It also noted that generally, a newly enacted law is applied prospectively.[[22]](#footnote-22) However, the Court qualified this by stating this is simply one rule of statutory interpretation that aids courts as they discern legislative intent, not a rule that is applied mechanically as there are scenarios where retroactive application can occur.[[23]](#footnote-23)

 Turning to the case before it, the Appellate Division agreed that N.J.S. 2A:50-56.1 was intended to be curative and provide guidance on an issue that had previously gone unaddressed by New Jersey statutes.[[24]](#footnote-24) Furthermore, the Court found party expectations warranted retroactive application of the statute and there would be no manifest injustice by doing so.[[25]](#footnote-25) In applying subsection (a) to the foreclosure action in question, Plaintiff’s 2015 suit was untimely since the statute of limitations had already run.[[26]](#footnote-26)

 On June 1, 2018, the New Jersey Supreme Court denied a petition for certification.[[27]](#footnote-27)

***B. Pfeifer v. McLaughlin***

 On July 26, 2007, Claude and Joanne Owen received a $53,000 loan from the Pfeifers that was set to mature on July 26, 2008.[[28]](#footnote-28) In order to ensure repayment of the loan, the Owens executed a non-purchase money mortgage on their property which named the Plaintiffs as mortgagees.[[29]](#footnote-29) This mortgage was recorded with the Monmouth County Clerk’s Office on September 21, 2007.[[30]](#footnote-30) The property was originally conveyed to Joanne Gillikin by a March 3, 1987 deed.[[31]](#footnote-31) Gillikin later changed her name after marrying Claude Owen in 1991.[[32]](#footnote-32)

 The mortgage identified the Owens as the debtors and described the property as previously given by deed to Joanne Gillikin in 1987.[[33]](#footnote-33) It contained a default clause allowing the Plaintiffs to declare a default and subsequently foreclose if the Owens either “(1) failed to make any payments by the due dates; (2) failed to keep any other promises in the mortgage; or (3) ‘ownership of the property changed for any reason.”[[34]](#footnote-34) There also was a “balloon payment” clause which required monthly payments until July 26, 2008, when the remaining balance would be due in full.[[35]](#footnote-35)

 The Owens defaulted after failing to make a monthly payment and providing the remaining balance when the loan was set to mature.[[36]](#footnote-36) This led to the Plaintiffs filing a foreclosure action on January 7, 2009, that was ultimately dismissed without prejudice for lack of prosecution[[37]](#footnote-37)

 On November 17, 2010, the McLaughlins received a deed to the property in question from the Owens which listed the grantors as “Joanne Gillikin Owen and Claude Owen”; this mortgage was later recorded on May 23, 2011, and re-recorded June 3, 2011, at the Monmouth County Clerk’s Office.[[38]](#footnote-38) Defendants then conducted a title search within the county using Joanne Gillikin as the grantee.[[39]](#footnote-39) This search revealed only the 1987 mortgage, but Stewart Title Company, the title agency used by Defendants, was aware that Joanne Gillikin was going by a different name since marrying.[[40]](#footnote-40) Stewart Title also ran a civil judgment search only using the last name “Owen.”[[41]](#footnote-41) These searches failed to reveal the July 26, 2007, mortgage held by the Plaintiffs.[[42]](#footnote-42) The Owens did not disclose the mortgage in an affidavit of title submitted during the transfer of title or in a certification submitted to the Chancery Division.

 When the Defendants closed on the property, the proceeds of the sale were not applied to the outstanding mortgage and on September 8, 2015, Plaintiffs filed a foreclosure action.[[43]](#footnote-43) In response, Defendants asserted the property had been acquired without knowledge of the mortgage and denied they were legally responsible for the debt.[[44]](#footnote-44) The Court granted the Defendants’ motion for summary judgment after finding Plaintiff’s foreclosure action time-barred under 6 year the statute of limitations in N.J.S. 2A:50-56.1(a).[[45]](#footnote-45) Since the mortgage matured on July 26, 2008, the latest a foreclosure suit could have been filed was July 26, 2014.[[46]](#footnote-46) The foreclosure suit was not filed until September 8, 2015.[[47]](#footnote-47)

 On appeal, Plaintiff argued a 20 year statute of limitations applied to the suit, citing the sponsor’s statement of N.J.S. 2A:50-56.1 which described the manner in which the law would “resolve uncertainties” surrounding the statute of limitations for residential foreclosure actions by “providing a specific statute of limitations of 20 years from the date of default by the debtor.”[[48]](#footnote-48) The Appellate Division began its analysis of the foregoing matter by noting that N.J.S. 2A:50-56.1 requires that foreclosure actions be commenced either (a) 6 years from the date of maturity; (b) 36 years from the date of recording or execution; or (c) 20 years from the date of default by the debtor, whichever is earlier.[[49]](#footnote-49) Prior to enactment of this provision, there was no statute of limitations for residential foreclosure suits.[[50]](#footnote-50) Case law had previously relied on time limits set out in adverse possession statutes which imposed a 20 year window for filing suit.[[51]](#footnote-51)

 The mortgage in question had a maturity date of July 26, 2008.[[52]](#footnote-52) The Owens defaulted by not making a monthly payment in May 2008, and then failed to pay back the sum of the loan on the maturity date.[[53]](#footnote-53) The statute of limitations applicable to this mortgage is 6 years pursuant to N.J.S. 2A:50-56.1(a).[[54]](#footnote-54) This meant that a foreclosure suit should have been filed between July 26, 2008 and July 26, 2014.[[55]](#footnote-55)

 While the text of the statute was clear, the Court found that the real issue was whether “the Legislature intended that … [the statute] should be applied retroactively to Plaintiff’s complaint under these circumstances.”[[56]](#footnote-56) In recounting settled principles of statutory construction on this issue, the Court first stated that New Jersey Courts have held that statutes are generally given prospective application.[[57]](#footnote-57) However, pursuant to the New Jersey Supreme Court’s decision in *In re D.C.*, two inquiries govern whether a statute can be applied retroactively.[[58]](#footnote-58) Courts will first look at

(a) “whether the Legislature intended to give the statute retroactive application” and

(b) “whether retroactive application of that statute will result in either an unconstitutional interference with ‘vested rights’ or a ‘manifest injustice.’”[[59]](#footnote-59)

In conducting the first inquiry, specific instances where retroactive application will result are:

1. Where the intention to apply a statute retroactively has been declared either explicitly or implicitly;
2. Where the statute is intended to be curative; and
3. When parties expect such applications of the law to occur[[60]](#footnote-60)

The Court first explained that explicit mention of a statute applying retroactively can be found in either the text or legislative history of a statute.[[61]](#footnote-61) Implicit intention can be found when such application gives the statute its most sensible interpretation.[[62]](#footnote-62) Courts presume prospective application of a statute when the Legislature is silent on that issue because, absent any indication to the contrary, the Legislature passes laws with the knowledge that courts usually enforce newly enacted statutes prospectively.[[63]](#footnote-63) The Court also discussed when a statute can be considered “curative” and noted that laws of this type are enacted to “remedy a perceived imperfection in or misapplication of the statute” and explain or clarify existing statutes.[[64]](#footnote-64)

In this case, the Court found that N.J.S. 2A:50-56.1 could not be applied retroactively.[[65]](#footnote-65) The Court said that it was not curative; it did not explain or clarify upon a preexisting statutory provision.[[66]](#footnote-66) Prior to enactment of this provision, residential foreclosure actions were governed by case law, not statute.[[67]](#footnote-67) Therefore, it was reversible error for the Court below to apply N.J.S. 2A:50-56.1 retroactively.[[68]](#footnote-68)

Although the primary reason for reversing the retroactive application of the statute was its lack of a curative element, the Appellate Division also noted that other situations that could have warranted retroactive enforcement of the statute were not present.[[69]](#footnote-69) The text of the statute did not indicate it applied retroactively nor was there extrinsic evidence the Legislature wanted this provision retroactively applied.[[70]](#footnote-70)

In light of the foregoing considerations, the Appellate Division held that the Plaintiff’s foreclosure action was not subject to retroactive application of N.J.S. 2A:50-56.1 and therefore a 20-year statute of limitations governed.[[71]](#footnote-71)

Searches of the New Jersey Courts website and Westlaw have revealed no petition for certification on file with the New Jersey Supreme Court.[[72]](#footnote-72)

**Recent Legislative Action**

On April 29, 2019, nine bills with bipartisan support were signed by Governor Murphy to address the large number of foreclosures occurring in the state.[[73]](#footnote-73) Among these bills was A5001 which amended N.J.S.2A:50-56.1(c) by reducing the statute of limitations for residential foreclosure actions from 20 years to 6 years where the debtor defaults and has not cured.[[74]](#footnote-74) The recent change to the law did not address the issue of retroactivity.

**Conclusion**

 Given the significance of the statutory provisions pertaining to foreclosures, and the split within the Appellate Division concerning the retroactivity of N.J.S. 2A:50-56.1, Staff requests authorization to conduct research and outreach to determine whether the addition of statutory language addressing applicability of this statute would assist its interpretation moving forward.

1. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 (App. Div. February 28, 2018); *Pfeifer v. McLaughlin*, 2018 WL 4167334 (App. Div. August 31, 2018). [↑](#footnote-ref-1)
2. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*5 (App. Div. 2018). [↑](#footnote-ref-2)
3. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*5 (App. Div. 2018). [↑](#footnote-ref-3)
4. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*1 (App. Div. 2018). [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*1 (App. Div. 2018). [↑](#footnote-ref-9)
10. *Id*. [↑](#footnote-ref-10)
11. *Id*. (Citing *Gibbons v. Gibbons*, 86 N.J. 515 (1981); *Phillips v. Curiale*, 128 N.J. 608 (1992); and *In re D.C.*, 146 N.J. 31 (1996)). [↑](#footnote-ref-11)
12. *Id* at \*2 (*Quoting Phillips*, 128 N.J. at 617 (1992). [↑](#footnote-ref-12)
13. *Id*. (*Quoting In re D.C.*, 146 N.J. at 51 (1996)). [↑](#footnote-ref-13)
14. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*2 (App. Div. 2018) [↑](#footnote-ref-14)
15. *Id*. [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. *Id*. [↑](#footnote-ref-17)
18. *Id*. [↑](#footnote-ref-18)
19. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*4 (App. Div. 2018). [↑](#footnote-ref-19)
20. *Id*. [↑](#footnote-ref-20)
21. *Id*. [↑](#footnote-ref-21)
22. *Id*. at \*5. [↑](#footnote-ref-22)
23. *Id*. [↑](#footnote-ref-23)
24. *Anim Investment Co. v. Shalhoub*, 2018 WL 1074741 at \*5 (App. Div. 2018). [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. *Id*. [↑](#footnote-ref-26)
27. *Anim Investment v. Shalhoub*, 233 N.J. 372 (2018). [↑](#footnote-ref-27)
28. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*1 (App. Div. 2018). [↑](#footnote-ref-28)
29. *Id*. [↑](#footnote-ref-29)
30. *Id*. [↑](#footnote-ref-30)
31. *Id*. [↑](#footnote-ref-31)
32. *Id*. [↑](#footnote-ref-32)
33. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*1 (App. Div. 2018). [↑](#footnote-ref-33)
34. *Id*. [↑](#footnote-ref-34)
35. *Id*. [↑](#footnote-ref-35)
36. *Id*. [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*2 (App. Div. 2018). [↑](#footnote-ref-38)
39. *Id*. [↑](#footnote-ref-39)
40. *Id*. [↑](#footnote-ref-40)
41. *Id*. [↑](#footnote-ref-41)
42. *Id*. [↑](#footnote-ref-42)
43. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*2 (App. Div. 2018) (At this point in the case, Michael Pfeifer had passed away and his wife continued litigating the foreclosure action). [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. *Id*. at \*3. [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. *Id*. [↑](#footnote-ref-47)
48. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*4 (App. Div. 2018). [↑](#footnote-ref-48)
49. *Id*. [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. *Id*. [↑](#footnote-ref-51)
52. *Id*. [↑](#footnote-ref-52)
53. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*4 (App. Div. 2018). [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *Id*. at \*5. [↑](#footnote-ref-55)
56. *Id*. [↑](#footnote-ref-56)
57. *Id*. (*Citing Gibbons v. Gibbons*, 86 N.J. 515, 521 (1981)). [↑](#footnote-ref-57)
58. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*5 (App. Div. 2018) (*Citing In re D.C.*, 146 N.J. 31, 50 (1996)). [↑](#footnote-ref-58)
59. *Id*. [↑](#footnote-ref-59)
60. *Id*. [↑](#footnote-ref-60)
61. *Id*. [↑](#footnote-ref-61)
62. *Id*. [↑](#footnote-ref-62)
63. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*5 (App. Div. August 31, 2018) (*Citing Maeker v. Ross*, 219 N.J. 565, 578 (2004)). [↑](#footnote-ref-63)
64. *Id*. (*Quoting Johnson v. Roselle EZ Quick, LLC*, 226 N.J. 370, 388 (2016). [↑](#footnote-ref-64)
65. *Id*. at \*6. [↑](#footnote-ref-65)
66. *Id*. [↑](#footnote-ref-66)
67. *Id*. [↑](#footnote-ref-67)
68. *Id*. [↑](#footnote-ref-68)
69. *Id*. [↑](#footnote-ref-69)
70. *Pfeifer v. McLaughlin*, 2018 WL 4167334 at \*6 (App. Div. 2018). [↑](#footnote-ref-70)
71. *Id*. [↑](#footnote-ref-71)
72. Supreme Court Appeals, New Jersey Courts, https://njcourts.gov/courts/supreme/scappeal.html (May 6, 2019); Westlaw, Thompson Reuters (May 6, 2019). [↑](#footnote-ref-72)
73. Michael Aron, *Murphy Signs Package of Bills to Alleviate NJ’s Foreclosure Crisis*, NJTV News (April 29, 2019) https://www.njtvonline.org/news/video/murphy-signs-package-of-bills-to-alleviate-njs-foreclosure-crisis/. [↑](#footnote-ref-73)
74. A5001 (2019). [↑](#footnote-ref-74)