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Fifth Circuit Confirms that RESPA Loss Mitigation Requirements Apply Only to Servicers

By Mark Tyson January 2019

The Real Estate Settlement Procedures Act ("RESPA") and Regulation X require that federally related mortgage loan "servicers" comply with certain loss mitigation procedures. *See, e.g.,* 12 U.S.C. § 2605; 12 C.F.R. § 1024.41. In particular, servicers are required to evaluate "all loss mitigation options available to the borrower" if a "complete loss mitigation application" is received "more than 37 days before a foreclosure sale." *See* 12 C.F.R. § 1024.41(c). The United States Court of Appeals for the Fifth Circuit recently confirmed that those obligations are only applicable to the "servicer," and that an originating lender or assignee of the loan are not "vicariously" liable for any such violations by the servicer. *See Christiana Trust v. Riddle*, No. 17-11429, 2018 WL 6715882 (5th Cir. Dec. 21, 2018).

The borrower obtained a home equity loan for $127,000 from her bank in 2006. *Id.* at *1. The servicing of the loan changed multiple times over the next few years, and the loan itself was assigned to a new owner in 2015. *Id.* Following the borrower's default, the new owner filed a judicial foreclosure action in 2016. *Id.* In response, the borrower filed a third party complaint asserting that the originating lender was vicariously liable for the "servicing agent['s]" alleged loss mitigation violations. Id. The district court granted the lender's motion to dismiss. *Id.* at *2.

The Fifth Circuit affirmed on two separate grounds. First, it found that the borrower failed to allege any "facts that suggest an agency relationship between [the lender] and either [servicer]." *Id.* at *3. "Without facts suggesting an agency relationship", the Court held that the borrower failed to state a claim for vicarious liability against the lender that was "plausible on its face." *Id.* at *4.

Second, even if the borrower had alleged facts to establish an agency relationship, the Fifth Circuit found that the claim would still fail "as a matter of law" because the lender "is not vicariously liable for the alleged RESPA violations of its services." *Id.* at *4. Although noting that other courts had reached a different result, the Court concluded that the "plain terms" of RESPA and Regulation X prohibited any vicarious liability claim. *Id.* at *4 & 5. "A loan servicer's obligation to follow [the loss mitigation] regulation derives from RESPA itself, which also confines this obligation to servicers alone." *Id.* at *4. Because only a servicer can "fail to comply" with these RESPA requirements, only a servicer is potentially "liable to the borrower" for the failure to comply. *Id*. Moreover, the Court noted that if Congress had intended to impose these RESPA requirements "more broadly" it clearly knew how to through more expansive language, as it had done with other RESPA provisions. *Id.*

Riddle faithfully follows the clear language of both RESPA and Regulation X. It should allow for the summary dismissal of loss mitigation claims against originating lenders or their assignees that were not involved in the servicing of covered loans.

To discuss RESPA loss mitigation further, please contact:

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