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Notes from the Compliance Cutting Room Floor

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Aug (2) ▼

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Archive

August 2018 (2)

July 2018 (4)

May 2018 (1)

April 2018 (1)

Topics

Bankruptcy

CFPB

ECOA

Mortgage Servicing

Regulation B

Regulation X

Regulation Z

RESPA

TILA

UDAAP

Friday, August 31, 2018

Construing the Nuances of the QWR

Every once and a while I get what may seem like an oddball question, but actually is a very perceptive question! There are so many intricacies to federal and state regulatory compliance laws, rules, regulations, and common practices, that it is a constant challenge to stay current.

Now you might think this is an oddball question: does a QWR relate only to servicing?

But it is not odd at all! In fact, the question is brilliant, and the answer requires considerable fine-tuning to be precise, comprehensive, and practicable.

Let's look closer!

RESPA Section 6 includes a set of procedures that mortgage loan servicers must follow when handling customer inquiries. The statute defines a Qualified Written Request (QWR) to mean:

> "[A] written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that – (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower."

Previously, Regulation X § 1024.21(e)(2) restated this definition almost word-for-word, except for two additions, one of which is relevant to the answer. Regulation X, RESPA's implementing regulation, added to item (ii) the phrase "relating to the servicing of the loan" before "sought by the borrower."

Today's version of Regulation X, in 12 CFR 1024.31, also includes the phrase "relating to the servicing of the loan" in its definition of the term:

> *"Qualified written request* means a written correspondence from the borrower to the servicer that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and either:
>
> (1) States the reasons the borrower believes the account is in error; or
>
> (2) Provides sufficient detail to the servicer regarding information relating to the servicing of the mortgage loan sought by the borrower."

If the borrower states the reasons for believing an error has occurred in the account, the borrower need not also provide sufficient detail regarding "information relating to the servicing of the mortgage loan." It probably would be fair to conclude that an account being in error relates to servicing, so a QWR must relate to servicing.

Regulation X §§ 1024.35(a) and 1024.36(a) explain that a qualified written request "that asserts an error relating to the servicing of the mortgage loan" is a Notice of Error (NOE) within the meaning of § 1024.35 and a qualified written request "that requests information relating to the servicing of the mortgage loan" is a request for information (RFI) within the meaning of § 1024.36.

The definition of "error" in Regulation X § 1024.35(b), which lists examples of what are and are not "errors," includes a catch-all category of "any other error relating to the servicing of a borrower's mortgage loan." This also suggests that the NOE must relate to servicing. In contrast, the RFI provisions of Regulation X § 1024.36(f)(1)(iii) do not define "information" and appear to encompass any request for information except when the "information is not directly related to the borrower's mortgage loan account." That's an interesting nuance, given that a Request for Information aims at identifying policies and best practices to promote consistent interpretation of existing authorities.

Since we're now in the tumultuous world of nuances, let's refine the answer even more. Regulation X § 1024.2(b) generally defines the term "servicing" to mean "receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. § 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower."

Courts differ regarding whether a QWR must relate to servicing. A federal district court in Ohio recently gave its opinion on the matter. Take *Baker v. Nationstar, LLC, 2018 U.S. Dist. (S.D. Ohio July 20, 2018)*.

In 1995, the Bakers obtained a mortgage loan to purchase their home. In 2008, the lender began foreclosure proceedings, which led to a foreclosure judgment that was ultimately vacated. The Bakers then hired counsel to dispute the servicer's collection activity.

The Bakers' counsel sent the servicer a letter on February 28, 2014, disputing all late charges, inspection fees, appraisal fees, force-placed insurance charges, legal fees, and other advances charged to the Bakers' account. The letter also requested eight categories of information, including a copy of all appraisals, property inspections, and risk assessments completed for the account.

The servicer responded by providing much of the information requested, and indicated that although the information regarding appraisals, property inspections, and risk assessments was unavailable, the information appeared correct.

The Bakers sued, complaining that the servicer's response had failed to comply with RESPA because it had not provided any information regarding the charges for appraisals and property inspections or a copy of the inspection reports.

In response, the servicer argued that it could not violate RESPA by failing to respond to inquiries about appraisals and property

inspections because those inquiries did not "relate to servicing" under RESPA.

The court granted partial summary judgment for the Bakers, holding that the servicer had failed to meet its obligations under RESPA § 6.

The court noted that was no reasonable dispute about whether the letter was a QWR. The letter had stated it was a QWR and its list of requested information clearly included items related to servicing, such as a complete payment history.

The court recognized that some courts had drawn a distinction between requests related to servicing and those that do not relate to servicing, and found RESPA liability available only for failing to respond to requests related to servicing.

Here's the point: the court did not agree that inquiries regarding appraisals and property inspection fees cannot create RESPA liability. The statutory language does not limit the definition of QWR to correspondences related to servicing. Nor does the statute mention the word "servicing" in its QWR definition. The request seeking information about appraisals and property inspections triggered the servicer's obligation to respond, regardless of whether the inquiry related to "servicing."

The court cited the U.S. Supreme Court's statement that where "Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (see *Russello v. United States, 464 U.S. 16, 23 (1983)).* Congress could have, but did not, include the word "servicing" in the definition of QWR or in its statement of options a servicer who receives a QWR must take within 30 days to fulfill its obligations under RESPA. Accordingly, "This Court will not read the word 'servicing' into the statute where it is not, and thus holds that the information sought by the borrower need not relate to servicing to constitute a QWR, and a servicer must fulfill its obligations under 12 U.S.C. § 2605(e)(2) regardless of whether such information relates to the statutory definition of 'servicing.'"

Thus, RESPA required the servicer to provide the borrower with the "information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer." The servicer was required to meet the substance of each of the Bakers' requests and explain why it could offer no more than it did. Instead, it did not include the requested information in its response nor did it explain why it was unavailable. The servicer did not point to any evidence that it had conducted a "reasonably thorough" examination. It had relied only on the language in its response to conclude that an investigation had been conducted.

What's more, the court offered an alternative basis for its holding: even if the information sought in a QWR must relate to servicing, the statutory definition of "servicing" is broad enough to encompass appraisals and inspection charges. The court rejected the servicer's argument that the definition was limited to the receipt and application of a borrower's payments, to wit, that the definition did not encompass the Bakers' failure to make and the servicer's failure to receive any payments for inspection or appraisal fees. In the court's words, "Whether a payment has been in fact received does not cabin the definition of 'receiving.' Rather, receiving is a process - implicit in the idea of receiving a payment is the idea that such a charge must first be made. It makes little sense for the RESPA analysis to turn on whether a servicer actually has a payment in hand. Borrowers must first be able to challenge the validity of the requested payment and seek information relating to the same."

And here's the malocchio-mugging denouement: the court also held that Ohio law time-barred the servicer and noteholder from any action to enforce the mortgage or note because more than six years

had passed since they had accelerated the due date by filing the ultimately vacated foreclosure action.

Not a good day for that servicer!

So, do you think a QWR relates only to servicing?

I would note that the court's opinion did not make clear why it never turned to Regulation X to support its conclusion. Instead, it based its decision solely on statutory analysis.

The Bakers certainly had a right to challenge the validity of the servicer's assessment of appraisal and property inspection fees. Assessing those fees to their account related to servicing, even if incurred during the foreclosure process. To be sure, RESPA and Regulation X do not put loans on an exit ramp due to foreclosure activities. To determine the legitimacy of those fees, the Bakers were certainly entitled to copies of the reports for which the fees were assessed.

Other recent court decisions have considered the applicability of statutes of limitation to actions to enforce mortgages, pointing out the need for lenders and servicers to keep an eye on the intricacies of timing. For example, in *Jorrie v. Bank of New York Mellon Trust Co., 2018 U.S. App. (5th Cir. July 2, 2018)*, a lender accelerated a mortgage note on June 8, 2009, but then faced two legal proceedings (an automatic stay in bankruptcy and a temporary injunction) that prevented it from exercising its right to foreclose. On March 27, 2014, the lender abandoned the acceleration by notifying the borrower that her note's balance was no longer due and she could cure her default by resuming her original loan payments. When the lender accelerated the note a second time on November 19, 2015, the borrower filed a quiet title action and claimed that Texas's 4-year limitations period barred enforcement of the lender's lien. However, the lender had precisely calculated the limitations period, adding 85 days for the automatic stay and 208 days for the temporary injunction, which had equitably tolled the limitations period to expire on March 28, 2014. Way to close to jumping past the comfort zone, the lender preserved its ability to enforce the lien just in time by abandoning its first acceleration on March 27, 2014.

I have found a recent 9th Circuit decision, *Steinberger v. Ocwen Loan Servicing, 2018 U.S. App. (9th Cir. June 28, 2018)*, that offers another means of "escaping" the effect of a statute of limitations by showing that the borrower had acknowledged the debt in separate writings - a forbearance agreement and a hardship affidavit - and made required payments due on the note during a trial modification period.

at August 31, 2018

Labels: Mortgage Servicing, Regulation X, RESPA

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