R E S P A ★ N E W S
MONTHLY

Analyzing complex federal law for real estate professionals

January 2022 | Volume 17, Issue 1

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Online Exclusive

Chopra asks staff to report former CFPB employees

https://bit.ly/3JcPz78

QUOTE OF THE MONTH

"We want to grow our brand and we want to get our information out there. But we need to do it compliantly."

- **Emily Farley,**
Chief lending officer, Atlantic Bay Mortgage Group

RESPA TIP

"A time share is a covered transaction under RESPA "if the lender's interest is secured by a lien on residential property."

The compliance risks of social media

Social media platforms like Facebook, LinkedIn, Twitter and Instagram are a great way to promote title insurance, real estate and mortgage companies. But it's important to remember all social media communications are subject to regulatory oversight.

"We want to grow our brand and we want to get our information out there. But we need to do it compliantly," said **Emily Farley**, chief lending officer at Atlantic Bay Mortgage Group.

Farley discussed where business and risk converge during a social media trends session at RESPRO's fall conference in Scottsdale, Ariz. Her co-panelists were **Amanda Tucker**, chief risk and compliance officer at Atlantic Bay Mortgage Group, and SafeGuard Cyber CEO/Co-Founder **Jim Zuffoletti**.

Tucker noted that a conversation between a real estate agent and a mortgage loan officer (MLO) that is perfectly appropriate live and in person becomes a different dynamic when that same conversation is converted into video content — because you're creating a record and reaching a broader audience.

"We are actually seeing regulators review a lender's corporate and individual MLO social media before and during an exam," she said. "They're actively looking at social media. They're looking at hashtags to identify areas where there may be content posted that is not appropriately disclosed."

Tucker suggested keeping RESPA Section 8 considerations in mind with all social media activities.

RESPA Section 8 prohibits giving or receiving a "Thing of value" in exchange for the referral of settlement service business. RESPA defines a Thing of value to include, among other things, money, services, discounts, commissions and the opportunity to participate in a money-making program.

As a result, real estate agents cannot receive gifts, prizes, fees or kickbacks (even if they are disclosed) for the referral of business to other settlement service providers. RESPA's regulation — Regulation X — provides an exception to Section 8 related to payments for normal promotional and educational opportunities.

"We have seen from some of our monitoring where MLOs are out there boosting content from a Realtor, or we're seeing co-marketing or even the Realtor or the mortgage loan officer is using content," she said. "We had someone say to us, `It's a dollar every time I use a 'like,' so what's the big deal?' With Facebook, that adds up. Depending on the campaign and content, it scales up. So, if you're using content multiple times a week, multiple times a month, those dollars add up. And it's a Thing of value if our MLO is boosting our Realtors' content. So, we have started to see regulators focus on boosting content across social media platforms."

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ABOUT US

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EDITOR'S NOTE

RESPA NEWS

New year, new me

“Simplicity is the ultimate sophistication.”
-Leonardo da Vinci, 1452

Dear Readers,

Every year, my new year’s resolution is to declutter my surroundings. This year, I have a forced head start.

When my kids left in August to go to college, I gave them most of my old furnishings since most of what I had was past its prime and time to replace anyhow. I never dreamed the COVID supply chain issue would have me still living in a near-empty house five months later and counting. (The plus side is my little mid-century ranch looks huge now with nothing in it. Also, there is no seating to host holiday celebrations).

The good news is, I survived two months without a kitchen table, guest bed or bathroom vanity. So, what’s another six months without any living room furniture? It’s actually proven to be quite a creative challenge for me to keep only what I absolutely need or love. In fact, I’m taking this new minimalism vibe so far that I have yet to buy a Christmas tree (and it’s Dec. 16 as I write this note).

This year was about getting rid of things from the past. In 2022, I plan to slowly introduce things I truly love to my environment. My walls and floors are bare, but my house is finally truly a home. As **Harold Bell Wright** in “The Uncrowned King” says:

“Eyes blinded by the fog of things
cannot see truth.
Ears deafened by the din of things
cannot hear truth.
Brains bewildered by the whirl of things
cannot think truth.
Hearts deadened by the weight of things
cannot feel truth.
Throats choked by the dust of things
cannot speak truth.”

What’s your resolution?

Happy New Year,

Tracey Read

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Editor
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OCTOBER RESEARCH LLC KNOWLEDGE... THE COMPETITIVE ADVANTAGE

Cover Story

Continued from Cover

Meanwhile, the pandemic has only accelerated Realtors' and title agents' desire to communicate with each other via social media and business communication platforms such as Microsoft Teams and Slack.

"We have seen an increase in our organization of communication outside of email," Tucker said. "I think we all recognize it's far quicker to hop into a Teams chat and message back and forth. The problem with that is with the information being shared, oftentimes your employees may be crossing over some consumer data protection laws, depending on which state you're in. Also, you've got some very real Gramm Leach Biley and privacy considerations. So just be cognizant of who owns the platform, who's administering the platform, what information may be traveling and then who's paying for the platform?

"(Teams) is something that we've moved away from and just said, 'No, our Teams platform is our Teams platform. You're going to have to use email.' "

Tucker also cautioned against using the video-focused social networking service TikTok for business dealings, saying her company does not permit the platform.

"This is something for any organization to keep in mind," Zuffoletti said. "Every social media company has a greater or lesser stance with respect to what information they'll make available to you as an organization if your employees are utilizing social media. And in the case of Facebook, and Twitter, and LinkedIn, and Instagram, there's a fairly sophisticated set of programs that are available such that you as an organization can allow your employees to engage in social media. And they provide the right kind of authorization, all of that information that's being shared with all of the messaging back and forth. You have the ability to inspect files and links and everything like that, so you can do a pretty comprehensive risk analysis.

"TikTok has none of that, literally, so they have no provision for you as an organization to have any kind of oversight associated with the content of your employees."

Zuffoletti added it's no longer true that social media technology is solely the responsibility of a company's chief information officer.

"These platforms have been adopted all over the organization, often with little oversight," he said. "And even in this day and age, there is a common misunderstanding about who's responsible for managing the risk associated with it. You really do see this dynamic where in one place, it's marketing in another place, it's going to be the technology organizations, in another place, it's going to be the risk organization. It's very decentralized, in terms of oversight."

Another problem with messaging platforms is that – just like with email — you can be the recipient of a phishing message.

"Just like you could get a malicious message on email, you can get the same kind of messages and get the same type of attacks that you would on WhatsApp, or on your DMs via LinkedIn, and the like," Zuffoletti said.

"And so the challenge in an organization is that even if you've got email really locked down, if you let somebody get on LinkedIn, on their own device, and use direct messages there, they may very well click on a piece of malicious content, or they may go to a phishing site that will ultimately compromise the organization.

"And so you can't just protect your network and your email, you have to think about protecting all of these platforms now."

CFPB releases fall rulemaking agenda

The Consumer Financial Protection Bureau (CFPB) has published its fall agenda of planned rulemaking activities. The semi-annual agenda, coordinated by the Office of Management and Budget, lists the regulatory matters the bureau anticipates considering from Nov. 1, 2021, to Oct. 31, 2022.

"In this regulatory agenda, the bureau is prioritizing the continuation of certain ongoing rulemakings that further the bureau's consumer financial protection mission and help to advance the country's economic recovery from the financial crisis related to the COVID-19 pandemic," the CFPB said in the agenda's preamble.

"The bureau also continues to prioritize work that promotes racial and economic equity and supports underserved, vulnerable and marginalized communities by, among other things, facilitating access to fair and affordable credit."

Top Stories

The agenda listed two items in the proposed rule stage. One of those priorities is Small Business Lending Data Under the Equal Credit Opportunity Act.

Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to require, subject to rules prescribed by the bureau, financial institutions to report information concerning credit applications made by women-owned, minority-owned, and small businesses.

Section 1071 requires that certain data be collected, maintained, and reported to the bureau, including whether the applicant is a women-owned, minority-owned, or small business; the number of the application and date the application was received; the type and purpose of the loan or credit applied for; the amount of credit applied for and approved; the type of action taken with respect to the application and the date of such action; the census tract of the applicant's principal place of business; the gross annual revenue of the business; and the race, sex, and ethnicity of the principal owners of the business.

It also gives the bureau authority to require any additional data it needs to fulfill its statutory purposes.

"The bureau has been working on this important and complex rulemaking for a number of years, including through research, supervisory work, policy development, and engagement seeking comment and information from the public, small-business lenders, and small businesses themselves, including minority- and women-owned small businesses," the CFPB said.

The other item in the proposed rule stage is Amendments to the Financial Institutions Reform, Recovery, and Enforcement Act(FIRREA) Concerning Automated Valuation Models.

The CFPB is working on a rule with the Federal Reserve, Office of the Comptroller of the Currency, the Federal Deposit Insurance Corp., the National Credit Union Administration and the Federal Housing Finance Agencyto update FIRREA to ensure a high level of confidence in the estimates produced by the valuation models, protect against the manipulation of data, seek to avoid conflicts of interest, require random sample testing and reviews, and account for any other such factor the agencies determine to be appropriate.

The bureau's agenda listed two items in the prerule stage — consumer access to financial records and Property Assessed Clean Energy (PACE) financing.

"In recent years, the availability of consumer financial account data in electronic form, often in real time or near real time, has helped consumers understand their finances and make better-informed financial decisions in a variety of ways. For example, research has indicatedthat the availability ofcertain consumer financial accountdata mayimprove underwritingandexpand access to credit.At the same time, themeans by whichthesedataareaccessed, transmitted, stored, and used can implicate significant privacy, security, and other consumer protection concerns," the bureau stated.

Section 1033 of the Dodd-Frank Act mandates the bureau make a rule to promote the development and use of standardized formats for information made available to consumers.

In November 2020, the CFPB publishedan Advance Notice of Proposed Rulemaking (ANPRM) about implementing Section 1033, accepting comments until February 2021.

"The bureau is reviewing comments received in response to the ANPRM and is considering those comments, as well as ongoing market monitoring efforts,as it assessespotential next steps, including whether a small business review panel is required pursuant to the Regulatory Flexibility Act," the agenda stated.

Meanwhile, Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act (ECOA) to require, subject to rules prescribed by the bureau, financial institutions to report information concerning credit applications made by women-owned, minority-owned, and small businesses.

It also gives the bureau authority to require any additional data it needs to fulfill its statutory purposes.

On Oct. 8, a Notice of Proposed Rulemaking was published in theFederal Register which would, if finalized as proposed, require financial institutions to report the amount and type of small business credit applied for and extended, demographic information about small business credit applicants, and key elements of the price of the credit offered, among other things. If finalized, the rule would also advance the goals of promoting racial and economic equity and supporting underserved, vulnerable, and marginalized communities, in that it would provide comprehensive small business lending data to help protect small business owners, including from unlawful discrimination, in their access to and use of fair and affordable credit.

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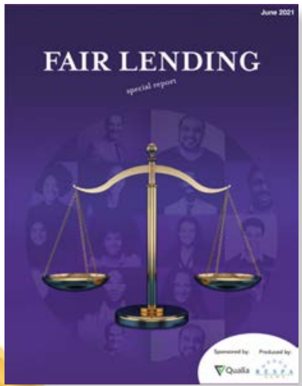
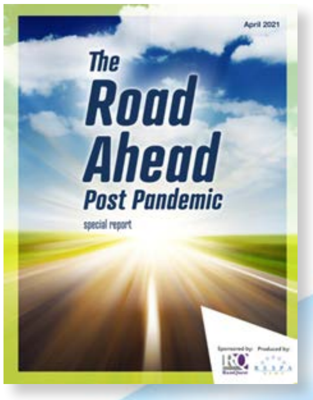
As a subscriber to *RESPA News*, we wanted to provide a friendly reminder of the extensive library of resources your subscription includes.





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The bureau's next action for the Section 1071 rulemaking is to review and consider the comments submitted in response to the proposed rule.

The agenda only had one item in the final rule stage - Facilitating transition away from the LIBOR Index.

"Earlier this week, we issued afinal ruleto address the anticipated expiration of the LIBOR index, which the UK Financial Conduct Authority has stated that it cannot guarantee publication of beyond June 2023," the bureau said. "This rulemaking is important for the millions of consumers who have adjustable-rate mortgages, credit cards, student loans, reverse mortgages, home equity lines of credit, or other loans that are tied to the LIBOR index."

CFPB wants input on five-year plan

The Consumer Financial Protection Bureau (CFPB) has published a preliminary strategic plan on where the agency is headed over the next five years. Meanwhile, the CFPB is seeking industry input to finalize its goals for fiscal years 2022 to 2026.

"The CFPB is committed to incorporating diversity, equity, inclusion, and accessibility in the way we meet our mission," the bureau said. "Racial and economic equity is embedded in the statutory mission of the CFPB, which includes protecting consumers from discrimination and ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access.

"The CFPB continues to foster an inclusive work environment by examining how we operate; eliminating systemic barriers to equal access of opportunities for CFPB employees; fostering an equitable and inclusive work environment; and expanding recruiting practices to increase workforce diversity; ensuring the diverse experiences and perspectives of CFPB employees are valued and respected; and implementing policies and programs that promote a model workplace that is free of discrimination, harassment, and retaliation."

The draft plan consists of the following four goals:

Protect consumers from unfair, deceptive and abusive practices

To further this goal, the CFPB said it plans to issue rules and guidance on the use of alternative data, machine learning or artificial intelligence, supervise institutions to ensure compliance, and enforce federal consumer financial laws to hold violators accountable and deter misconduct and repeat offenses. The bureau also said it plans to carefully evaluate the potential benefits and costs and the racial and economic equity implications of contemplated regulations and address outdated regulations.

The CFPB also plans to focus supervision and enforcement resources on institutions and their product lines that pose the greatest risk to consumers based on the nature of the harm, nature of the product, field and market intelligence, and the size of the institution and product line, as well as address unlawful conduct affecting minority and traditionally underserved communities.

Empower underserved consumers

The CFPB plans to launch a targeted public engagement and outreach strategy to tribal, rural, limited English proficient (LEP), and other underserved communities to build awareness of the CFPB's mission, tools and resources to drive better outcomes to America's 45 million "credit invisible" consumers.

Other objectives are to ensure companies offering consumer financial products and services provide timely responses to consumers' complaints. In addition, the CFPB said it will prioritize its Housing Insecurity Campaign to help consumers facing housing insecurity or those displaced from housing due to COVID-19. Developing relationships with government agencies, private industry, fair lending, civil rights, economic experts and academics, and consumer and community advocates to promote fair lending compliance and education, including on redlining, algorithmic bias, appraisals, LEP and special purpose credit programs are also key factors to help traditionally underserved consumers, the bureau said.

Inform public policy with data analysis

The CFPB said it will do a better job collecting and maintaining the data and other intelligence necessary to effectively monitor markets for risks to consumers, ensuring its policy development and other functions are informed by the latest market developments and trends, and analyzing consumer complaints to identify areas of risk to consumers. In addition, the bureau said it will conduct and publish research focused on experiences of underserved and vulnerable communities and their access to credit; consumer awareness, understanding, and behavior with respect to consumer financial products and services and with respect to disclosures and related communications; and market developments impacting consumers, including competition and innovation.

Commit to workforce equity

The bureau is seeking ways to cultivate a diverse and inclusive workforce, such as employment programs focused on minorities and women. Strategies to implement a modern, forward-leaning workplace model responsive to the CFPB's organizational needs include:

- Optimizing utilization of the CFPB's workplace to promote the well-being, safety, security, accessibility, and productivity of all employees.
- Deploying and maintaining a complementary suite of cost-effective and secure tools and technology to optimize the way staff can execute their work collaboratively and efficiently.
- Furthering the goals of the CFPB's Office of Equal Opportunity and Fairness, such as enforcing federal civil rights laws prohibiting workplace discrimination; coordinating fair lending activities and ensuring fair, equitable, non-discriminatory access to credit for both individuals and communities, and maintaining the Disability and Accessibility Program.

Comments on the CFPB's draft strategic plan may be sent to CFPB_Strategy@cfpb.gov by Jan. 3.

CFPB: Lenders commit pricing, religious discrimination

The Consumer Financial Protection Bureau's (CFPB) latest Supervisory Highlights report shows fair lending and mortgage servicing issues continue to be a problem. The publication highlighted supervisory findings that led to public enforcement actions in the first half of 2021.

"Today's report reveals that irresponsible or mismanaged firms harmed Americans during the COVID-19 pandemic," CFPB Director **Rohit Chopra** said in a release. "We will continue to supervise firms to halt harmful practices before they become widespread."

CFPB examiners often find problems during supervisory examinations that are resolved without an enforcement action. In all cases where CFPB examiners find problems, they alert the company to their concerns, and, in many instances, outline recommended remedial measures. When appropriate, the bureau opens investigations for potential enforcement actions.

One issue discovered was mortgage servicers charging improper fees to borrowers enrolled in CARES Act forbearance.

"This past year, the CFPB prioritized mortgage servicing supervision due to the increase in borrowers applying for and receiving mortgage forbearance due to the COVID-19 pandemic," the bureau said. "While the CARES Act prohibits mortgage servicers from imposing fees on consumers receiving CARES Act forbearance, CFPB examiners found that mortgage servicers still charged borrowers late fees and default-related fees. These illegal fees exacerbated the economic hardships experienced by struggling homeowners in 2021. Examiners observed that mortgage servicers failed to refund some of the fees until almost a year later."

CFPB examiners also identified several violations of the Equal Credit Opportunity Act by mortgage lenders. The examination team found mortgage lenders discriminated against Black and female borrowers in the granting of pricing exceptions, compared to non-Hispanic white and male borrowers.

Specifically, examiners found lenders lacked oversight and control over how mortgage loan officers granted pricing exceptions to customers. Examiners identified lenders with statistically significant disparities for incidences of pricing exceptions for Black and female applications compared to similar non-Hispanic white and male borrowers.

CFPB examiners also found lenders improperly considered small-business applicants' religion in their credit decisions. For religious institutions applying for small-business loans, some lenders improperly utilized a questionnaire that contained explicit inquiries about an applicant's religion.

Top Stories

Payday lending was another problem spot.

CFPB examiners found lenders improperly debited or attempted to debit consumers' bank accounts. In some instances where consumers called to authorize a loan payment by debit card, lenders' systems erroneously indicated the transactions did not process, resulting in the improper debiting of additional, identical amounts or unauthorized attempts.

"Consumers had no reason to anticipate debits or attempted debits and could not prevent them from occurring," the CFPB said.]

"These practices significantly harmed consumers by depriving them of access to their funds and creating the risk of nonsufficient fund fees or overdraft fees levied by their banks.

"These violations demonstrate the ongoing risk that irresponsible payday lending practices pose to American consumers. The CFPB will continue to exercise and enforce its authority in the payday lending market to protect vulnerable consumers and their economic dignity."

Examiners also found consumers were deprived of their rights by remittance providers who received notices of errors alleging remitted funds had not been made available to designated recipients by disclosed dates of availability. Providers then failed to investigate whether deductions imposed by some foreign banks constituted a fee the institutions were required to refund to the sender as part of the error resolution process.

HUD, CFPB encouraging lenders to create programs

The Department of Housing and Urban Development (HUD) has released guidance clarifying special purpose credit programs that conform with the Equal Credit Opportunity Act (ECOA) and Regulation B generally do not violate the Fair Housing Act.

HUD's Fair Housing and Equal Opportunity (FHEO) division said bridging the racial and ethnic homeownership gap requires more than combating current and future discrimination.

"Because narrowing the homeownership gap is an effective way to bridge the inequities that exist today, FHEO is encouraging lenders to take two important steps designed to remedy the continuing legacy of past discrimination," **Demetria McCain**, principal deputy assistant secretary for FHEO, said in a release. "First, FHEO encourages lenders to review current and historic barriers to credit and homeownership faced by people of color and other underserved communities.

"Second, FHEO encourages lenders to help resolve these inequities through special purpose credit programs designed to assist those who have historically been locked out of homeownership opportunities, such as economically disadvantaged classes of persons and first-time homebuyers whose parents and grandparents may have been excluded from the housing and credit markets by discriminatory policies."

ECOA recognizes special purpose credit programs as one mechanism that financial institutions can use to open the door to homeownership for underserved populations who have historically been denied that opportunity. They are a special type of lending program that allows lenders and other groups to direct financial assistance to groups who have been historically locked out of homeownership.

"When amending ECOA in 1976, Congress recognized that special purpose credit programs may be established to help remedy longstanding discrimination in credit markets and that such remedial programs do not themselves constitute unlawful discrimination," McCain added.

"But very few of these programs have been established to create home ownership opportunities for affected communities. When asked why they have not previously established special purpose credit programs, some lenders told HUD and other federal agencies that they are willing to establish such programs to improve homeownership opportunities for racial and ethnic groups who have been underserved historically, but that they are worried that those programs may run afoul of the Fair Housing Act and other federal anti-discrimination laws."

The Consumer Financial Protection Bureau (CFPB) issued guidance last year, directed at for-profit institutions, that helped answer some questions about how to lawfully create a special purpose credit program.

"The special purpose credit program provisions of ECOA and Regulation B provide targeted means by which creditors can better serve communities who have been historically shut out or otherwise disadvantaged," CFPB Director **Rohit Chopra** said in a statement following HUD's announcement. "I encourage creditors to explore the opportunities available through special purpose credit programs."

CFPB wants feedback on lending discrimination

The Consumer Financial Protection Bureau (CFPB) is seeking input on ways it can maintain a fair, competitive, and non-discriminatory mortgage market.

The CFPB issued a request for information (RFI) to gather feedback on rules implementing the Home Mortgage Disclosure Act (HMDA). The CFPB plans to review recent changes to the rules and evaluate their effectiveness.

HMDA, which was originally enacted in 1975, requires many lenders to report information about the home loans for which they receive applications or that they originate or purchase. The public and regulators can use the information to monitor whether financial institutions are serving the housing needs of their communities, to assist in distributing public-sector investment to attract private investment to areas where it is needed, and to identify possible discriminatory lending patterns.

The CFPB finalized changes to the HMDA regulations in 2015, expanding the types of data reported by lenders to improve overall market information and help with monitoring for fair lending compliance. The 2015 rule also improved the reporting process by aligning requirements with industry data standards, significantly enhancing the technological interface, and easing requirements for some small banks and credit unions.

The CFPB is seeking comments on its plans to assess the effectiveness of the HMDA Rule. Specifically, the CFPB will focus on institutional coverage and transactional coverage; data points; benefits of the new data and disclosure requirements and operational and compliance costs.

The CFPB welcomes the public's input, and the RFI will remain open for 60 days after publication in the Federal Register.

The RFI follows an August 2021 HMDA report which found mortgage lenders more often deny credit and charge higher interest rates to Black and Hispanic applicants than they do to white applicants, and a July 2021 bureau analysis of mortgage lending patterns within the Asian American Pacific Islander communities.

The CFPB maintains an online tool that provides access to the public loan data, allowing users to filter information, create summary tables, download the data and save their results.

FDIC, OCC and the Fed approve cyber incident final rule

Federal bank regulatory agencies have approved a final rule to improve the sharing of information about cyber incidents that may affect the U.S. banking system.

The agencies collectively received 35 comments from banking and financial sector entities, third-party service providers, industry groups and other individuals. Compliance with the final rule is required by May 1, 2022.

The final rule requires a banking organization to notify its primary federal regulator of any significant computer-security incident as soon as possible and no later than 36 hours after the banking organization determines a cyber incident has occurred, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corp. (FDIC) announced.

Notification is required for incidents that have materially affected — or are reasonably likely to materially affect — the viability of a banking organization's operations, its ability to deliver banking products and services, or the stability of the financial sector.

In addition, the final rule requires a bank service provider to notify affected banking organization customers as soon as possible when the provider determines that it has experienced a computer-security incident that has materially affected or is reasonably likely to materially affect banking organization customers for four or more hours.

"Cyberattacks targeting the financial services industry have increased in frequency and severity in recent years," the regulators said. "These cyberattacks can adversely affect banking organizations' networks, data, and systems, and ultimately their ability to resume normal operations. Given the frequency and severity of cyberattacks on the financial services industry, the agencies believe that it is important that a banking organization's primary federal regulator be notified as soon as possible of a significant computer-security incident that disrupts or degrades, or is reasonably likely to disrupt or degrade, the viability of the banking organization's operations, result in customers being unable to access their deposit and other accounts, or impact the stability of the financial sector."

The regulators said a majority of commenters supported the proposal, agreeing that providing prompt notice of significant incidents is an important aspect of safety and soundness, and they supported transparent and consistent notification from bank service providers to their banking organization customers.

"A number of these commenters offered suggestions to clarify certain aspects of the requirements or lessen the perceived burden," they said. "Commenters also generally supported the agencies' efforts to harmonize with existing definitions and notification standards. Four commenters opposed the proposal, contending that compliance would be burdensome or duplicative of existing requirements, and may impede banking organizations' and bank service providers' abilities to respond effectively to incidents."

Most commenters argued the proposed definition of "notification incident" was overly broad and should be narrowed and only require reporting of incidents involving actual harm.

"Commenters asserted that any definition should incorporate time, risk, and scale elements, which commenters viewed as critical," the regulators added. "In addition, commenters urged the agencies to replace the 'good faith' standard with a banking organization's or a bank service provider's 'determination' or a reasonable basis to conclude that an incident had occurred, to provide a more objective and concrete standard."

Dual tracking claim survives in Washington court

A Washington man claimed his servicer failed to take timely action in response to his request to avoid foreclosure.

The servicer argued the borrower's inquires do not meet the definition of qualified written requests (QWRs) because they were mailed to the wrong address.

The case is *Tierney v. Carrington Mortgage Services LLC et al (U.S. District Court, W.D. Washington at Seattle, No. C20-1245RSM).*

Plaintiff **Patrick Leonard Tierney** sued Carrington Mortgage Services LLC and the Bank of New York Mellon over the defendants' attempts to pursue foreclosure.

The facts

Aztec Foreclosure Corp. issued Tierney a notice of default on Oct. 25, 2019. On Dec. 9, 2019, Aztec set a sale date of April 17, 2020. The sale was postponed to June 19, 2020, and then again to July 24, 2020. Tierney managed to stop the sale by filing a lawsuit with a motion for temporary restraining order (TRO) in state court.

On July 22, 2020, the state court granted Tierney's TRO pending an Aug. 20, 2020, preliminary injunction hearing, finding the borrower was entitled to equitable relief based upon evidence the defendants "lulled Tierney to believe that the July 24, 2020, foreclosure auction had been postponed."

On July 15, 2020, Tierney learned the auction had not been postponed. By that time, Tierney had no ability to prevent the sale other than by filing the pending ex parte application for injunctive relief. Neither Carrington nor Aztec offered evidence or argument in opposition to this finding.

The preliminary injunction hearing never happened in state court because the defendants removed the action to federal court.

Case Law

On April 30, 2019, prior to any type of delinquency notice from defendants, Tierney's attorney called the mortgage servicer Carrington to disclose the death of Tierney's wife and of his need for mortgage assistance. One week later, Carrington sent Tierney a notice of pre-foreclosure options.

Tierney submitted what he thought was his completed request for mortgage assistance (RMA) application to Carrington on May 31, 2019. On June 4, Carrington acknowledged receipt of the application and requested additional documents.

Tierney alleged he provided Carrington with the documents requested in its June 4, 2019, letter. Thirty days later, Carrington sent Tierney a notice stating his RMA application had been cancelled because the servicer did not receive all documents to complete its review process.

On Dec. 10, 2019, Carrington sent Tierney a letter purporting to acknowledge an RMA application submitted on Dec. 3, 2019. The defendants submitted a letter from Tierney's attorney dated Dec. 3, 2019, requesting an in-person meeting for mortgage assistance.

On Jan. 11, 2020, Carrington declared the purported December 2019 RMA application to be "complete." Two days later, Carrington denied that application on the grounds the loan was past its maturity date and therefore ineligible for a modification. On April 7, 2020, Carrington sent Tierney two letters. The first April 7 letter served to "inform" Tierney his loan was delinquent and stated: "Carrington offers several loss mitigation options if you are having difficulty making your mortgage payments."

The second letter purports to confirm Tierney had requested the disposal of his home by short sale. However, Tierney argued he never made such a request, orally or in writing.

The ruling

Tierney alleged the defendants violated RESPA by failing to respond to written requests for information or inquiry regarding the account, by engaging in "dual tracking," and by manufacturing grounds for denial of his RMA application.

The servicer argued Tierney has failed to show a likelihood of success on a dual tracking claim, because each of Tierney's RMAs was denied due to lack of requested documents prior to the foreclosure proceedings.

In his most recent opinion, Chief U.S. District Judge **Ricard Martinez** stated he disagreed with Tierney's argument that Carrington's notice of servicing transfer letter and cancellation notice contain no mention of QWRs or notices of error.

"The court has reviewed these letters and finds that Mr. Tierney's counsel is just plain wrong," Judge Martinez wrote.

"The notice of servicing transfer letter explicitly states that QWRs were to be sent to a different address than payments. It uses the term `QWR.' Plaintiff's counsel cites to pages 1 and 2 of the letter, as attached by Carrington, but ignores page 3, cited by defense counsel. This one mention of where to send QWRs might not be dispositive, as it would be understandable that such correspondence could get lost prior to Mr. Tierney's need to send a QWR.

"However, as Carrington points out, the letters of April 11, 2019, and July 24, 2019, explicitly state where to send 'QWRs' on a third page called 'Important Disclosures.' In any event, it appears to the court that the monthly billing statements explicitly state where to submit QWR correspondence. Mr. Tierney's counsel does not address this point. If there was some argument under equity to get around this requirement, it is not made by plaintiff's counsel. Taking all of the above into consideration, the court finds as a matter of law that Carrington cannot be liable under RESPA for failing to respond to written requests for information or inquiry regarding the account."

However, the judge found the RESPA claim against the servicer regarding the dual tracking allegation survives.

Section 1024.41(g) prohibits dual tracking, which "occurs when a lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options." Liability for dual tracking violations attaches only if a loan servicer receives a loss mitigation application 37–45 days before a foreclosure sale, according to 12 C.F.R. § 1024.41(b)(2)(i).

"RESPA prohibits commencing foreclosure while a complete loss mitigation application is under review," the judge stated.

"However, requests for loss mitigation that are incomplete do not trigger the dual tracking provisions of RESPA. The parties disagree on whether Mr. Tierney's loss mitigation application(s) were incomplete, or whether Carrington was using this as a ruse to deny loss mitigation relief and avoid liability under RESPA. It is undisputed that Carrington received a request for mortgage assistance on Dec. 3, 2019, but went ahead and issued a notice of trustee's sale six days later. Viewing the evidence and drawing inferences in the light most favorable to the non-moving party, the court concludes that a genuine dispute as to material facts precludes summary judgment for defendants on this claim."

Maryland judge allows TRID lawsuit to proceed

A Maryland woman filed a TRID lawsuit after her servicer allegedly illegally foreclosed upon her.

The defendants argued the entire second amended complaint (SAC) should be dismissed under the doctrine of res judicata.

The case is *Garey v BWW Law Group, LLC et al (U.S. District Court, D. Maryland, Southern Division, No. 19-cv-03112)*.

Monica Garey filed the original lawsuit in 2019 and the SAC in October 2020. She purchased the Waldorf, Md., property on March 29, 2015. The property was sold in a foreclosure sale on Aug. 20, 2019, after SunTrust Mortgage sent Garey a series of communications regarding the status of her loan.

BWW, on behalf of the substitute trustees, filed the foreclosure action on Dec. 12, 2018. Garey was not personally served in the foreclosure action. A private process server's affidavit indicates after two good faith attempts at personal service had failed, he posted a copy of the summons and complaint on the borrower's front door and copies also were sent by certified mail. However, Garey alleged she did not become aware of the foreclosure action until she received notice the property was going to be sold.

In April 2019, SunTrust alleged the amount due to reinstate the loan was $63,704.02 , which Garey called "inflated by at least $3,000." Garey also claimed the April 2019 statement did not indicate foreclosure proceedings had begun.

On June 19, 2019, Garey received a letter from BWW indicating ownership of the property may be transferred to SunTrust Bank within the next 60 to 90 days as a result of a foreclosure sale, and that ownership would likely later be transferred to the Department of Housing and Urban Development (HUD).

Garey sought recovery for the damages allegedly caused by BWW's and SunTrust's actions during the foreclosure process which, she contends, violated TILA and RESPA, among other laws.

RESPA

Res judicata bars a party from suing on a claim that has already been litigated to a final judgment. In this case, the defendants alleged the claims had already been litigated by the Circuit Court, which previously ratified the foreclosure sale.

"Ms. Garey argues that res judicata is inapplicable to her claims against BWW and SunTrust because 'a foreclosure action is ordinarily a summary, in rem proceeding,' which 'would normally have no in personam effect on a mortgagor's subsequent claim,' (quoting Jones Bank v. HSBC Bank USA, N.A., 444 Fed. Appx. 640, 644 (4th Cir. 2011). She reasons that it "is only when a mortgagor voluntarily appears and raises objections that the action results in an in personam judgment with preclusive effect." Ms. Garey is mistaken," District Judge **Paul Grimm** said in his ruling.

"Although Maryland law historically has allowed for summary in rem foreclosure proceedings, the procedural rules surrounding foreclosure actions more recently have changed to provide homeowners with more notice and greater opportunities to challenge the foreclosure. The present rules governing foreclosure proceedings require 'the plaintiff [to] serve on the borrower and the record owner a copy of all papers filed to commence the action[.]' "

The judge noted Garey did not dispute the plaintiffs in the foreclosure action made two attempts at personal service and mailed the necessary paperwork as required. She did dispute the papers were posted on her door, but does not challenge the authenticity of the affidavit of service.

"Garey communicated with SunTrust multiple times and requested that the sale be cancelled but neglected to take any action in the foreclosure action itself," Grimm wrote.

"In short, Ms. Garey had notice and opportunity to contest the foreclosure in the underlying foreclosure action but failed to do so."

The judge also addressed whether the documents addressed in the individual RESPA claim against SunTrust qualify as a qualified written request (QWR), notice of error (NOE) or request for information (RFI).

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"There appears to be some confusion among federal courts applying RESPA as to whether a NOEs and RFIs are subsets of QWRs, or whether they are three different categories of communication, each requiring a different kind of response," he stated. "The CFPB's official interpretation supports the latter view and explains that there is overlap between the three."

Specifically, the judge noted:

- A valid QWR must "relate to servicing" and not simply question the validity of a loan or request copies of loan documents for inspection the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3).
- A RFI is broadly defined to include "any written request for information from a borrower that ... states the information the borrower is requesting with respect to the borrower's mortgage loan." 12 C.F.R. § 1024.36(a).
- A NOE is also broadly defined as "any written notice from the borrower that asserts an error and that includes ... the error the borrower believes has occurred." 12 C.F.R. § 1024.35.

"Ms. Garey has not specified what kind of 'covered error' was identified in her letters to SunTrust, but it can be reasonably inferred from the allegations of the SAC that her letter asked SunTrust to cancel the foreclosure sale because, she claimed, foreclosure was not permitted at that time due to SunTrust's purported failure to 'send her a copy of the final loss mitigation affidavit and a request for postfile mediation" and to comply with HUD's face-to-face meeting requirement," the court stated. "Construing those allegations in the light most favorable to Ms. Garey, SunTrust may arguably have been proceeding with the foreclosure sale in violation of § 1024.41(g). At this early stage in the proceedings, that is enough. Therefore, I conclude that Ms. Garey's Aug. 10, 2019, correspondence may constitute a NOE under RESPA."

Because Garey sufficiently alleged that she sent SunTrust a NOE, that SunTrust failed to respond as required by statute, and that she suffered actual damages as a result, SunTrust's motion to dismiss the individual RESPA count against it was denied.

TILA

The judge next addressed the individual TILA claim alleging SunTrust violated § 1638(f) by failing to: provide accurate cure amount[s] in the periodic mortgage statements, provide notice that a foreclosure action had been filed in the periodic mortgage statements and to provide periodic mortgage statement on a regular basis.

SunTrust argued Garey failed to adequately allege actual damages under TILA. However, the judge found Garey has stated a plausible claim for relief under § 1639(g) by failing to provide a payoff statement.

The judge noted 15 U.S.C. § 1639(g) requires a mortgagor to send an accurate payoff balance in no more than seven business days after receiving a written request from or on behalf of the borrower.

"Unlike a claim for a violation of § 1638(f), for which recovery is limited to actual damages, a borrower bringing a claim for a violation of § 1639(g) may seek actual damages, statutory damages, and costs and attorneys' fees," he wrote "SunTrust claims that Ms. Garey's § 1639(g) claim must nevertheless fail because the SAC does not identify when Ms. Garey requested a payoff amount.

"It is true that Count 11 itself does not include this information, and that its internal citations supporting its claim appear to be incorrect. However, Paragraph 45 of the SAC alleges that Ms. Garey sent SunTrust a letter on Aug. 10, 2019, asking SunTrust to cancel the foreclosure sale. Immediately thereafter, in Paragraph 46, Ms. Garey alleges that she 'also requested SunTrust send her a cure amount.... And she requested a payoff amount.' Although this portion of the SAC is far from a model of clarity, it is reasonable to infer from the allegations of Paragraphs 45 and 46 that Ms. Garey requested a payoff amount on Aug. 10, 2019. And because Ms. Garey has also sufficiently alleged that SunTrust failed to respond to that letter as required under TILA, I find that Ms. Garey has stated a plausible claim for relief under TILA at 15 U.S.C. § 1639(g).

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Servicer challenges CFPB's amended mortgage rules

The heirs of a Rhode Island woman accused a servicer of committing several RESPA violations relating to the deceased borrower's mortgage agreement.

Citizens One Home Loans filed a motion to dismiss the 2019 lawsuit, arguing the plaintiffs, who were not parties to the mortgage, lacked standing.

The court denied that motion without prejudice and allowed the plaintiffs to file a motion for leave to amend the complaint addressing the standing issue. After **Marta Faria** was then named administratrix of the estate of **Apolonia Morais**, the plaintiffs filed an amended complaint.

The plaintiffs alleged in the amended complaint that Citizens breached the mortgage agreement and, therefore, the foreclosure was void.

In addition, they claimed the servicer failed to properly respond to, or to correct errors raised in, a series of notices of errors (NOEs).

The case is *Ana Faria, Philipe Faria, Marta Faria, Catarina Travasso as successors in interest and heirs at law of Apolonia Morais, Marta Faria in her capacity as administratrix of the estate of Apolonia Morais, v. Citizens Bank, N.A. and Otoro, LLC (U.S. District Court, D. Rhode Island, No. 19-CV-00427).*

The facts

Apolonia Morais, the plaintiffs' decedent, signed a mortgage with Citizens in 2004 for an East Providence, R.I., residential property. The plaintiffs are heirs at law of Morais and the fee owners of the property. Mortgage payments apparently went into arrears. In December 2017, Citizens sent a notice of default to the Morais' estate at the property's address.

On Feb. 26, 2018, Citizens scheduled a foreclosure sale for April 24, 2018. The notice of sale was mailed to all the plaintiffs at their individual home addresses. The bank previously mailed all plaintiffs notices of mediation at their home addresses.

At the foreclosure sale, Otoro, LLC was the purchaser of the property, and a foreclosure deed was recorded on July 11, 2018.

The plaintiffs alleged several claims that Citizens violated 12 C.F.R. § 1024.36(c) and 12 C.F.R. § 1024.36(d)(2)(i)(A) of Regulation X, the implementing regulations of RESPA.

They had mailed Citizens several NOEs after the foreclosure sale had taken place. Citizens responded that the plaintiffs were not borrowers and had no standing to make such requests for information.

It is the plaintiffs' contention that, because they are successors in interest, Citizens failed to properly respond to these notices or to address the alleged errors.

The ruling

A defendant may only be liable under RESPA to a "borrower." Under 12 U.S.C. § 2605(f). While that term is not defined in RESPA or its implementing regulations, courts generally define a "borrower" as one who signed the promissory note securing the mortgage.

However, under recent amendments to Regulation X by the Consumer Financial Protection Bureau, which became effective on April 19, 2018, the term "borrower" was changed to include a "confirmed successor in interest," Judge **Mary McElroy** noted in her recent opinion.

"Thus, confirmed successors in interest, having the status of borrowers, may assert a cause of action for RESPA violations," McElroy wrote.

"A 'successor in interest' is defined as 'a person to whom an ownership interest in a property securing a mortgage loan ... is transferred from a borrower, provided that the transfer is ... [a] transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety[.]' A successor in interest becomes 'confirmed' when 'a servicer has confirmed the successor in interest's identity and ownership interest in a property to that secures a mortgage loan.... (12 C.F.R. § 1024.31.)

"Citizens argues that the plaintiffs have no standing to assert their RESPA claims because the amended complaint does not specifically label themselves as 'confirmed' successors in interest. But the plaintiffs argue that they have alleged facts that Citizens treated them as such, having mailed the individual plaintiffs the required notice of mediation and notice of sale. The plaintiffs therefore set forth, if only at this early pleading stage, facts to plausibly allege that Citizens considered them confirmed successors in interest and thus borrowers entitled to bring claims under RESPA."

Citizens also argued nothing in the new regulations establishing confirmed successors in interest as borrowers indicates it can be applied retroactively.

The judge agreed with that argument and determined some of the alleged violations must fail because they occurred prior to April 19, 2018.

"But intertwined in the plaintiffs' RESPA claims is Citizens' alleged failure to properly respond to the notices of error, all of which were sent after April 19, 2018," the judge added.

"As such, the plaintiffs assert facts sufficient to state a plausible claim for RESPA violations and so Counts III through VIII will survive the motion to dismiss."

Therefore, the court granted Citizens' motion to dismiss the breach of contract claims and request for a declaratory judgment.

However, the six RESPA claims survived the motion to dismiss.

California finds woman has case for RESPA damages

A California woman claimed a series of mortgage loan servicing errors caused her to become in arrears through no fault of her own.

The servicer asked a judge to dismiss the TRID lawsuit, claiming the borrower failed to prove she suffered any damages.

The case is *Ikeda v. San Francisco Firemen Credit Union (SFFCU), et al (U.S. District Court, N.D. California, No. 20-cv-08071)*.

Katherine Ikeda filed the original suit on Nov. 16, 2020, against her credit union lender and the loan servicer, Cenlar FSB, related to a $1.8 million loan used to help finance the $2.4 million purchase of property in San Francisco. U.S. Magistrate Judge **Thomas Hixon** recently granted in part and denied in part the defendants' motion to dismiss.

The facts

Ikeda and co-borrower **Margueritta Mouawad** purchased the property in 2016. At some point after origination, the credit union engaged Cenlar to service the loan, but Ikeda alleged she never received notification of the change in servicers.

For the next two and a half years, there were no problems. Then, in December 2018, the monthly loan statements issued by Cenlar (which still bore the credit union's name and logo) began showing allegedly past due amounts and a higher monthly payment. Ikeda repeatedly called SFFCU seeking an explanation but, unbeknownst to her, these calls were routed to Cenlar.

The agents with whom she spoke told her the representative could not answer her questions because only the designated 'single point of contact' was authorized to answer questions concerning the loan. Ikeda was never able to reach or speak with her single point of contact despite leaving several voicemail messages with the designated contact.

Ikeda later learned SFFCU and/or Cenlar had established an escrow account to hold amounts allegedly due for property taxes and/or insurance, and was including a monthly escrow charge, effectively doubling the monthly loan payment.

On multiple occasions between December 2018 and August 2019, Ikeda or her attorney requested that SFFCU specify the sum necessary to bring the loan current. On multiple occasions, she paid the precise sum identified by SFFCU and/or Cenlar, only to have the payment rejected as an insufficient "partial payment," resulting in imposition of additional late fees, and interest, or accepted, without ever resolving the alleged delinquency, resulting in assessment of yet more late fees and interest.

In the process of reviewing her loan statements and other materials, Ikeda identified numerous additional issues of concern.

For example, it appeared the defendants had purchased "force placed" insurance for the property, even though the borrower believed she had maintained the required insurance on the property. She also discovered the lender and servicer made derogatory — and allegedly improper — reports to the credit bureaus.

The court's recommendations

Ikeda claimed the defendants failed to timely respond to qualified written requests (QWRs) and correct their servicing errors. She also alleged they provided her with inaccurate information, failed to properly credit payments to her loan, and assessed improper late charges, penalties and interest — overstating the amount owed by more than $95,000.

The defendants argued Ikeda failed to plead how the violations caused any actual damages to her.

Ikeda paid the full amount demanded under protest, reserving the right to sue to recover the overpayment. She also alleged the defendants' inaccurate credit reporting — including reporting during the 60-day period following their receipt of her QWRs — resulted in her being unable to obtain financing for a new home.

"Based on these allegations, the court finds Ikeda has plausibly alleged 'concrete harm caused by the RESPA violation itself,' the magistrate stated.

The defendants argued Ikeda's claim under 12 U.S.C. § 2605(c)(1) fails because she does not plead a direct connection between the failure to provide notice of transfer and the damages she suffered.

Section 2605(c)(1) provides that "each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer."

The magistrate noted Ikeda unsuccessfully attempted to obtain accurate information from defendants beginning in December 2018, and that her difficulties were exacerbated because she was unaware SFFCU transferred the loan servicing obligation to Cenlar.

"Ikeda alleges that, had she been aware that the servicing obligation had been assigned to a third party, and that she was no longer dealing with a local credit union, she could have taken more aggressive action sooner to address Cenlar's ongoing servicing errors," the court added.

"Based on these allegations, the court finds Ikeda has adequately plead a direct causal link between defendants' maintenance of a 'deliberate, knowing fiction that the loan was still being serviced by SFFCU' and the damages she suffered."

Ikeda also claimed the defendants wrongfully assessed charges for 'force-placed insurance' covering the property, in violation of 12 C.F.R. § 1024.37.

Under RESPA, servicers are prohibited from obtaining such insurance "unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance."

The court found Ikeda has adequately stated a claim under § 2605(k).

"Ikeda alleges she was unaware defendants purchased force-placed insurance until she reviewed her loan statements and other materials," the magistrate wrote.

"As part of her first QWR, Ikeda requested defendants provide details regarding the loan servicer's compliance with RESPA's requirements. Ikeda also alleges she maintained the required insurance on the property. The court can reasonably infer from these allegations that defendants acquired force-placed insurance without first complying with RESPA's notification requirements, and thus had no reasonable basis for believing that Ikeda had not maintained this insurance herself."

Ikeda claimed the lender and servicer failed to credit certain payments on the loan as of the date of receipt, in violation of TILA section 129f, 15 U.S.C. § 1639f.

However, the defendants argued Ikeda's claim is time-barred because she alleges she was notified of her higher monthly payment in December 2018, and she or her attorney contacted either SFFCU or Cenlar on "multiple occasions" between December 2018 and August 2019, yet she filed this case over one year later.

An action for damages under TILA must be brought within one year from the alleged violation. Under 15 U.S.C. § 1640(e), the statute of limitations period runs from "the date of consummation of the transaction" — the time that a consumer becomes contractually obligated on a credit transaction.

The magistrate recommended the TILA claims against Cenlar be dismissed, but may move forward against the credit union.

"Ikeda alleges she was notified of her higher monthly payment in December 2018, yet she did not file this case until Nov. 16, 2020, nearly two years later," he stated.

"Accordingly, even when the facts are viewed in the light most favorable to her, it is clear that more than one year has passed since her loan transaction was consummated."

The magistrate noted that TILA provides for a private right of action against creditors or lenders, not loan servicers.

"Here, it is undisputed that Cenlar was the loan servicer, not the creditor," he stated.

"… As such, this cause of action cannot be maintained against Cenlar and dismissal is appropriate. However, the court may hold a creditor liable for its servicer's TILA violations. Thus, SFFCU may be held liable for Cenlar's alleged violations."

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Rhode Island man files suit over NOEs after foreclosure

A Rhode Island man alleged a mortgage servicer violated its duty to respond to notices of error (NOE) as required by RESPA.

The servicer argued the man failed to allege concrete injury or cognizable damages.

The case is *Kenneth Fitch, estate of Dianne L. Fitch, v. Federal Housing Finance Agency, Federal National Mortgage Association, Wells Fargo Bank, N.A., Harmon Law Offices, Rushmore Loan Management Services, LLC, US Bank National Association as trustee for RMAC Trust (U.S. District Court, D. Rhode Island, No. 18-cv-214).*

Until a foreclosure sale on July 28, 2017, **Kenneth Fitch** and, until her death, **Dianne Fitch**, owned property in Cumberland, R.I. In 2009, the plaintiff borrowed $96,648 from Wells Fargo secured by a mortgage. On April 16, 2016, Wells Fargo sent Fitch a letter explaining the loan was in default and Wells Fargo would accelerate if the arrearage was not cured. On June 22, 2016, a Rhode Island housing mediation coordinator affirmed Wells Fargo had fully complied with the pre-foreclosure mediation requirement.

On March 22, 2017, Wells Fargo assigned the mortgage to Federal National Mortgage Association (FNMA) but continued to be the servicer on the account. Acting as the servicer for FNMA, Wells Fargo claimed it sent an acceleration letter on March 31, 2017, and a notice of sale letter on April 20, 2017.

After being advertised between May 2017 and July 2017, the foreclosure sale was scheduled for July 28, 2017. Two days before the foreclosure sale, on July 26, 2017, Rushmore Loan Management Service, LLC became the owner of the loan, but no assignment of the mortgage was recorded.

The amended complaint alleged FNMA transferred its interest in the mortgage by an unrecorded assignment on an unknown day prior to July 26, 2017. The foreclosure auction was conducted on July 28, 2017, by Wells Fargo as servicer for FNMA and the real estate was conveyed by a foreclosure deed given by FNMA to defendant 266 Putnam Ave, LLC in consideration for payment of $188,000.

On Oct. 1, 2017, Wells Fargo ceased to be the servicer for the account; that responsibility was switched to Rushmore. On Oct. 20, 2017, 266 Putnam initiated proceedings to evict Fitch. Soon after, Fitch began to send Wells Fargo numerous letters that were the foundation for his RESPA claims.

"That is, all of Plaintiff's RESPA/ Regulation X letters were written after the real estate had been sold at foreclosure and after Wells Fargo no longer was responsible for servicing or had any other interest in the real estate, the mortgage or the loan," Magistrate Judge **Patricia Sullivan** noted in her recent opinion.

Six of the first set of letters, all dated Oct. 26, 2017, were Regulation X requests for information (RFIs). The seventh letter, also dated Oct. 26, 2017, is the sole basis for the last of the amended complaint's counts against Wells Fargo – counts seven and eight.

The NOEs accused Wells Fargo of failing to send a default letter and an acceleration letter, failing to comply with Rhode Island's mediation requirement and allowing the foreclosure to proceed on behalf of FNMA after it had "no interest in the note or the mortgage." The first NOE demanded the servicer correct the errors by removing all legal fees, costs, charges and expenses arising from the notice of sale and the foreclosure.

Wells Fargo informed Fitch it was working on gathering the information requested and advised him the servicing and collection notes, inspection and legal fees, documents had been sent to Rushmore (the new servicer).

"Soon after, on Nov. 30, 2017, well in advance of the NOE-1 deadline, Wells Fargo responded to NOE-1 and further to the October 2017 RFIs with a substantive letter, which provided plaintiff with a detailed 'Customer Account Activity Statement' and purported to enclose a long list of documents that seemingly correspond to what had been sought by the six RFIs, coupled with the advisory that Wells Fargo had determined that, apart from what was being provided, plaintiff's letters were overbroad and sought confidential, privileged and/or proprietary material," the magistrate stated.

"This response appears to address all issues raised in NOE-1, including by supplying copies of the acceleration and default letter and the mediation compliance materials, as well as by advising that Wells Fargo had investigated plaintiff's claim that FNMA should not have been the mortgagee at the foreclosure and concluded that the foreclosure had been conducted consistent with the mortgage and applicable law. The response reminds plaintiff that Rushmore had become his

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loan servicer and supplied contact information for Rushmore. In addition to providing this substantive information, all of Wells Fargo's response letters comply with RESPA's requirement that they include a name and contact information for a person designated to help if plaintiff had questions."

The magistrate added almost five months after receiving Wells Fargo's facially complete response, Fitch filed the lawsuit.

The original complaint accused Wells Fargo of violating RESPA solely because of plaintiff's dissatisfaction with its response to NOE-1. It also asserted claims against FNMA, the Federal Housing Finance Agency, and 266 Putnam challenging the foreclosure, arguing that FNMA was constitutionally barred from using Rhode Island's non-judicial foreclosure procedure and seeking damages and injunctive relief because FNMA did not comply with Rhode Island's mediation requirement, and was not authorized to foreclose because it had executed an unrecorded assignment of the mortgage before the foreclosure. The plaintiff did not name Wells Fargo as a party to any of the claims for relief arising from the foreclosure.

"After initiating the case, plaintiff resumed sending RESPA/Regulation X letters to Wells Fargo," she added. "The second wave of letters, dated June 15, 2018, are premised on Wells Fargo's alleged failure to respond to NOE-1 and the six October 2017 RFIs. Largely ignoring Wells Fargo's facially complete response sent six months before, the seven June 2018 NOEs invoke 12 C.F.R. § 1024.35 and duplicate the substantive content of NOE-1 and the six October 2017 RFIs. With one exception, they allege as 'error' that Wells Fargo's 'refus[al] to respond' to NOE-1 and the October 2017 RFIs because it had invoked the 'confidential, privileged and/or proprietary' character of the requested materials and otherwise supplied nothing.

"As the exhibits to the amended complaint make clear, this assertion also is simply untrue. In fact, Wells Fargo's actual response provided detailed information and enclosed a long list of documents, all of which was ignored by the June 2018 NOEs."

Sullivan recommended Wells Fargo's motion to dismiss be granted and that counts seven and eight be dismissed without prejudice based on lack of subject matter. Alternately, the magistrate recommended the court grant Wells Fargo's motion and dismiss the counts based on the amended complaint's failure to state a plausible claim.

DOJ settles Massachusetts sexual harassment suit

The Department of Justice (DOJ) has resolved allegations Worcester, Mass., landlord **Mohan Prashad** and his maintenance worker, **David Besaw**, violated the Fair Housing Act by sexually harassing female tenants.

The settlement also resolves claims against Lanaton LLC and Savton LLC, which, along with Prashad, owned the properties where the harassment occurred.

Under the consent decree, which still must be approved by the U.S. District Court for the District of Massachusetts, the defendants are required to pay $65,000 to compensate individuals harmed by the harassment, a $10,000 civil penalty, and vacate a judgment the defendants had obtained against a former tenant in housing court.

The consent decree bars future discrimination and retaliation, requires that property management responsibilities be turned over to one or more individuals approved by the federal government, mandates the implementation of a sexual harassment policy and complaint procedure and Fair Housing Act training, and requires detailed reporting regarding property management activities and compliance. It also bars Prashad and Besaw from participating in property management responsibilities at residential rental properties.

"Sexually harassing tenants in their homes and retaliating against those who lodge complaints are egregious forms of sex discrimination that violate the Fair Housing Act," Assistant Attorney General **Kristen Clarke** for the Justice Department's Civil Rights Division said in a release. "The Justice Department is committed to safeguarding the rights of vulnerable tenants who are subjected to sexual harassment or retaliatory evictions because of their sex."

The lawsuit, filed in 2019, alleged that since at least 2009, Prashad subjected female tenants to harassment that included making unwelcome sexual advances and comments, making unscheduled and frequent visits to certain tenant units without legitimate property management reasons for the visits, and taking adverse actions against tenants who resisted his sexual overtures. The complaint further alleged Besaw sexually harassed and assaulted tenants and Prashad, after receiving notice of Besaw's harassment, retaliated against one tenant by filing an eviction action against her and failed to take action to prevent Besaw from engaging in additional sexual harassment.

The case was jointly litigated by the Civil Rights Division and the Civil Rights Unit of the U.S. Attorney's Office for the District of Massachusetts. Since launching its Sexual Harassment in Housing Initiative in October 2017, the DOJ has filed 23 lawsuits alleging such conduct and recovered over $4.9 million for victims.

FHA: MMI Fund holding strong despite delinquencies

The Department of Housing and Urban Development (HUD) has released its fiscal year (FY) 2021 report to Congress on the financial health of the Federal Housing Administration (FHA) Mutual Mortgage Insurance Fund (MMIF).

In addition to its emphasis on delivering relief options to homeowners financially impacted by the COVID-19 pandemic, FHA said it continued to deliver on its mission of enabling homeownership for first-time borrowers, those with low and moderate incomes, and households of color.

The MMIF increased its overall capital ratio, ending the fiscal year at 8.03 percent, an increase of 1.93 percentage points over FY 2020's 6.10 percent capital ratio. The capital ratio is one indicator of the MMIF's financial health and includes both the FHA-insured single family forward and reverse mortgage portfolios.

In addition, for the first time since 2015, the HECM reverse mortgage program has a strong positive ratio, primarily due to strong national home price appreciation.

The HECM reverse mortgage portfolio saw a significant improvement in its valuation.

It has a stand-alone capital ratio of 6.08 percent as of Sept. 30, 2021, compared with a negative 0.78 percent capital ratio the previous year.

"The strength of the fund is a promising sign and solidifies the important role FHA fulfills in making homeownership a reality for first-time homebuyers and those with lower incomes," HUD Secretary **Marcia Fudge** said in a release.

"This year, our administration took unprecedented steps to deliver relief to those devastated by the pandemic. Managing the strong fiscal health and performance of the FHA program is a top priority, and I am encouraged to see the MMI Fund remain resilient through the events of the past year.

Looking ahead, we will ensure FHA is well positioned to provide broad and equitable access to homeownership, especially for those who have been historically underserved in the mortgage market."

The MMIF supports FHA's singlefamily mortgage insurance programs, including all forward mortgage purchase and refinance transactions, as well as mortgages insured under the HECM reverse mortgage program.

FHA said the fund remains well positioned to withstand future economic events and endure the outcomes from the pandemic induced delinquencies that remain in forbearance or are seriously delinquent.

As of Sept. 30, 2021, FHA had active insurance on more than 7.8 million single-family forward and reverse mortgages, with a total unpaid principal balance of more than $1.2 trillion.

Meanwhile, the percentage of first-time homebuyers using FHA insurance reached a new high of 84.61 percent of total FHA forward mortgage purchase endorsements in FY 2021. The share of mortgages insured by FHA to minority borrowers reached almost 42 percent of all FHA forward mortgage insurance endorsements in FY 2021.

FHA served double the percentage of Black and Hispanic borrowers when compared to those served through mortgage originations by the rest of the housing market this past fiscal year.

FHA's forward mortgage portfolio achieved solid performance with a stand-alone capital ratio of 7.99 percent as of Sept. 30, 2021, an increase of 1.68 percentage points over the previous year.

Industry News

HUD issues climate action plan

The Department of Housing and Urban Development (HUD) has released its Climate Action Plan, which details a comprehensive strategy to reduce the agency's energy and carbon footprint to help build a more equitable, efficient and sustainable housing infrastructure.

HUD Secretary **Marcia Fudge** recently joined world and business leaders virtually for the United Nations Framework Convention on Climate Change Conference of the Parties in Glasgow, United Kingdom, to announce HUD's plan for climate justice by increasing the resilience of vulnerable communities, investing in green and resilient buildings, and creating good-paying jobs in new industries.

"We are in the midst of a global climate crisis, and we have limited time to respond. HUD's Climate Action Plan will meet the urgency of this moment," Fudge said in a release. "The U.S. is leading the fight against climate change, and in Glasgow, we will set the example at home and around the world that HUD and the entire Biden-Harris administration is committed to delivering climate justice in our communities."

The Climate Action Plan was developed in response to President **[Joe] Biden**'s executive order on Tackling the Climate Crisis at Home and Abroad. In keeping with the executive order, as well as the president's initiative to advance environmental justice and racial equity, HUD will implement a broad approach to the climate crisis that reduces climate pollution; increases resilience to the impacts of climate change; protects public health; delivers environmental justice and spurs well-paying union jobs and economic growth.

HUD has established the Climate and Environmental Justice Council comprised of assistant secretaries from across the agency. The council will enable HUD to deliver climate and environmental justice throughout the department's work.

"Cities and localities are on the front lines of the climate emergency, and low-income residents and people of color often bear more of the impact when climate-related disasters strike," HUD said.

The plan's healthy housing goals include revising environmental review policies to ensure consideration of climate — and environmental justice-related hazards and health risks in all proposed site selection and placement of new assistance activities. HUD will also continue to collaborate with Local agencies and nongovernmental organizations to help the impacted community identify available resources and appropriate solutions to eliminate hazards and improve residents' overall health, the agency added.

FHFA releases 2022 strategic plan

The 2022 Scorecard for Fannie Mae and Freddie Mac fulfills the GSEs' core mission requirements by promoting sustainable and equitable access to affordable housing and operating in a safe and sound manner.

The Federal Housing Finance Agency (FHFA) has released a new strategic plan to hold the government-sponsored enterprises (GSEs) accountable.

The 2022 Scorecard for Fannie Mae and Freddie Mac fulfills the GSEs' core mission requirements by promoting sustainable and equitable access to affordable housing and operating in a safe and sound manner.

"The 2022 Scorecard will better position the enterprises to support the housing market throughout the economic cycle," FHFA acting Director **Sandra Thompson** said in a release. "Key to the enterprises fulfilling their statutory mandates is their ability to advance sustainable and affordable homeownership and rental housing opportunities, and to improve their capital position by transferring credit risk away from the taxpayer."

The 2022 Scorecard focuses on specific GSE goals that address affordability, fair lending, and equity, in addition to promptly addressing examination and supervision findings, and ensuring sufficient liquidity to sustain Fannie Mae and Freddie Mac through severe stress events.

It also ensures the enterprises prioritize climate risk, as well as the principles of diversity and inclusion, throughout their

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Week In Washington

HUD promoting 'self-help' homeownership

The Department of Housing and Urban Development (HUD) has awarded $10 million in Self-Help Homeownership Opportunity Program (SHOP) grants.

The money will help three national and regional organizations facilitate innovative homeownership opportunities, especially in low-income communities.

"These grants are a step forward in closing the homeownership gap in this nation," HUD Deputy Secretary **Adrianne Todman** said in a release. "With these funds, we are boosting homeownership opportunities through the help of local organizations that prioritize our mission of providing accessible housing to all. We now need to enact the president's Build Back Better Act to bring our nation closer to making the dream of homeownership a reality for all Americans."

Three national and regional groups were selected to distribute the funds to local initiatives that support affordable housing and community development — Habitat for Humanity International, Inc. (HFHI); Housing Assistance Council (HAC) and Community Frameworks (CF).

The awards will be used to increasing administrative support to projects that facilitate and encourage innovative homeownership opportunities through the provision of self-help housing, especially in rural areas.

The continued partnership with local communities and organizations will help rebuild and revitalize neighborhoods and improve the lives of residents by expanding access to affordable housing and homeownership opportunities, HUD said.

The SHOP grants will be distributed as follows:

- HFHIwill receive $4.1 million and will leverage $93,270,000. HFHI is a private, non-profit, ecumenical Christian organization that has assisted Habitat affiliates in building and rehabilitating more than 100,000 self-help homeownership housing units in partnership with low-income people in the United States since 1976. The grant award will be used to complete a minimum of 222 SHOP units. Completed units will be sold to low-income homebuyers who have contributed a significant amount of sweat equity toward the construction of their homes.
- HAC will receive $3.2 million and will leverage $129,672,410. HAC is a national non-profit, self-help housing organization that will use its SHOP funds to purchase land and make necessary infrastructure improvements in primarily rural areas. Completed units will be sold to low-income homebuyers who have contributed a significant amount of sweat equity toward the construction of their homes. The grant award will be used to complete a minimum of 171 SHOP housing units.
- CF was awarded $2.6 million and will leverage $13.6 million. CF is a regional non-profit, self-help housing organization that serves the states of Idaho, Montana, Oregon and Washington. Grant award funds will be used to complete a minimum of 141 SHOP housing units.

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decision-making processes, according to FHFA.

The objectives of the 2022 plan include taking "significant actions" to ensure all borrowers and renters have equitable access to long-term affordable housing opportunities.

Other key takeaways of the plan were to continue mortgage selling, servicing, and asset management efforts that promote sustainable home-retention solutions for borrowers affected by the COVID-19 pandemic. Other goals include fostering competition and efficiency in housing finance markets and to leverage technology and data to promote efficiency and cost savings in mortgage processes.