Do RESPA's Loss Mitigation Procedures Really Apply After a Borrower Leaves a Residence?

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The Consumer Financial Protection Bureau (CFPB)'s mortgage servicing rules, which took effect on January 10, 2014, contain a number of detailed loss mitigation procedures that servicers must follow after a payment default. The loss mitigation procedures are found at 12 C.F.R. §§ 1024.39 through 1024.41, which is a part of Regulation X, the implementing regulation for the Real Estate Settlement Procedures Act ("RESPA").

Among other requirements, the loss mitigation procedures require servicers to make a good faith effort to contact borrowers before the 36th day of delinquency and to inform borrowers of available loss mitigation options. 12 C.F.R. § 1024.39. Servicers must also refrain from initiating foreclosure until a loan is at least 120 days delinquent. 12 C.F.R. § 1024.41.

But what happens when a delinquent borrower moves out? Do RESPA's loss mitigation procedures still apply?

The answer is no based on the language of Regulation X. Section 1024.30(c)(2) states that "[t]he procedures set forth in §§ 1024.39 through 1024.41 … only apply to a mortgage loan that is secured by a property that ***is*** a borrower's principal residence." 12 C.F.R. § 1024.30(c)(2) (emphasis added). So, if a property ***is*** no longer a borrower's principal residence, Reg. X's loss mitigation rules no longer apply, right?

Not so fast. At least two federal district courts have refused to dismiss RESPA claims for violations of Regulation X's loss mitigation procedures despite the fact that the borrowers moved out before the alleged violation occurred. In *Barrett v. Green Tree Servicing, LLC*, the borrowers left their residence *five years* before the alleged violation; yet, the United States District Court for the Southern District of Ohio decided that "the relevant question is the purpose for which the mortgage loan was made. … Here, the Barretts obtained the loan to purchase property that they occupied as their primary residence for several years before they were transferred to another state. … It is irrelevant that the alleged RESPA violations occurred after the Barretts vacated the property." 2014 WL 6809203 at *1-3 (S.D.

Ohio Dec. 2, 2014).

More recently, the United States District Court for the Middle District of Florida addressed the same issue. In *Amarchand v. CitiMortgage, Inc.*, the district court expressed “some doubt whether the protections afforded by RESPA apply [after the borrower left her residence], particularly considering that the regulations under which Plaintiff sues exist to ‘help borrowers stay in their principal residence, where possible[.]’” 2016 WL 1031303 at *1 (M.D. Fla. Mar. 9, 2016). Yet, the district court continued, “for purposes of Defendant’s motion, it cannot be said that Plaintiff’s claim has no facial plausibility with respect to this issue.” *Id.*

These two cases highlight the burden placed on servicers. Not only must they read, understand, and implement compliance procedures in response to thousands of pages of regulations. They also must deal with this: a court might disagree about what the meaning of “***is***” is.

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