2022 Consumer Practice Extravaganza

FDCPA, RESPA and More

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CONCURRENT SESSION

2022

Recognizing Bankruptcy Litigation Opportunities

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TOPICS IN THIS SESSION

- Loan Modifications
- Dual Tracking
- RESPA
- Credit Reporting
- Rule 3002.1

REGULATION X

- Bookmark this website: http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/
- 1024.31 defines service provider as "any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee."

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REGULATION X

GO READ THIS CASE: St. Claire v. DiTech Financial LLC, Order Adopting in Part and Declining to Adopt in Part Magistrate Judge's Report and Recommendation Case No. 17-cv-3370-AT-JFK (NDGA 09/21/2018)

RESPA 101: Pages 6-16

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REGULATION X - No Injunctive Relief

- No specific provisions in the rules or statutes for injunctive relief.
- Federal Doctrine of Abstention and Rooker-Feldman Doctrine make federal court interference in state court proceedings unlikely.
- State courts not bound regulations at all

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REGULATION X - Summary of Damages

- Civil Penalties
  - Up to $2,000 per violation under RESPA
  - Up to $4,000 per violation under TILA
- Actual Damages
  - Legal fees in defending foreclosure
  - Damage to credit
  - Permanent Damage from public record of wrongly filed foreclosure
  - Emotional Distress (Medical Care not necessary)
  - Shifting of Attorney's Fees

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REGULATION X - Pattern and Practice

- Statutory Damages require Pattern and Practice:
  Meija v. Ocwen Loan Servicing LLC, 703 F. App'x 860, 864 (11th Cir. 2017) ("Moreover, courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words, suggesting "a standard or routine way of operating." *McLean*, 595 F. Supp. 2d at 1365 (quoting *In re Maxwell*, 281 B.R. 101, 123 (Bankr. D. Mass. 2002)). Failure to respond to one, or even two qualified written requests does not amount to a "pattern or practice." *See id.*

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REGULATION X - Pattern and Practice

- Section 2605(f) explicitly indicates that a failure to comply with damages gives rise to damages for each such failure and the failure to comply with separate provisions of the statute can render Rushmore liable for separate damages. Moore v. Caliber Home Loans, Inc., Case No. 14-cv-00852-MRB, Memorandum Opinion on Motion to Dismiss, Page ID#223, (SDOH 2015, J. Barrett); see also Weber v. Seterus, Case No. 16-cv-06620, Memorandum Opinion on Motion for Summary Judgment, Page ID#109 (NDIL 03/28/2018: Judge Durkin)

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REGULATION X Basics

12 CFR 1024.36—Requests for information.

Substantial information available without the need for a dispute.

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REGULATION X Basics

- Requests for Information (RFI) replace Qualified Written Requests
- No need for a dispute
- Much more information is available
- Tight response times
  - 10 to 30 business days
- Send a Notice of Error (NOE) if response is not timely, or if information provided is incorrect
- Tight Response Times on NOEs
- **ALL SUBJECT TO SUIT, STATUTORY PENALTIES, DAMAGES AND SHIFTING OF ATTORNEYS FEES**

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REGULATION X Basics

- Who is the investor
  - Critical for determining modification restrictions
- Servicer's view of the current state of Escrow
- Amount of alleged arrearage that is composed of servicer imposed charges such as:
  - Excessive Number of Appraisals
  - Excessive Inspections
  - Forced Place Insurance
- This is especially important with all of the servicing transfers going on right now

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REGULATION X Basics - Notices of Error

- 12 C.F.R. §1024.36(a)

  Must include
  - Name of borrower
  - Information to identify loan account
  - Error thought to have occurred

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REGULATION X Basics - 12 C.F.R. 1024.35(b)

- (b)(1) - Failure to accept payment
- (b)(2) - Failure to apply accepted payment
- (b)(3) - Failure to credit payment to account
- (b)(4) - Failure to pay/refund escrow
- (b)(5) - Improperly charging of a fee
- (b)(6) - Failure to provide accurate payoff balance

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REGULATION X Basics - 12 C.F.R. 1024.35(b)

- (b)(7) - Failure to comply with Early Intervention Requirements
- (b)(8) - Failure to accurately/timely transfer information about servicing of loan to new servicer
- (b)(9) - Improperly initiating foreclosure process

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REGULATION X Basics - 12 C.F.R. 1024.35(b)

- (b)(10) - Improperly moving for foreclosure judgment or order of sale
- (b)(11) - Any other error in servicing of loan

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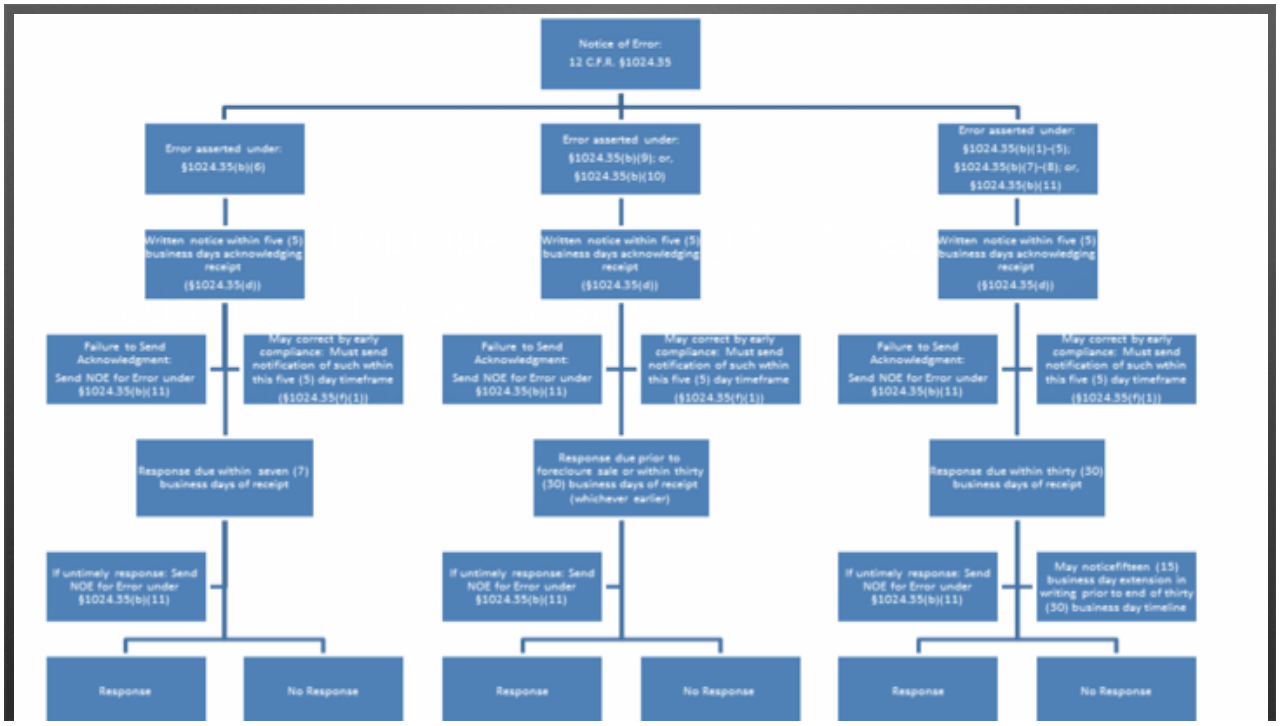

REGULATION X Basics - 12 C.F.R. 1024.35(c)

12 C.F.R. §1024.35(c)
Servicer can establish specific address for Receipt of NOE.

<u>If a servicer does this:</u>
Address must be written on billing statements and accessible for viewing on website

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REGULATION X Basics - 12 C.F.R. 1024.35(d)

Acknowledgment of Receipt - **12 C.F.R. §1024.35(d)**

- Servicer must send acknowledgment of receipt within 5 business days of receipt

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REGULATION X Basics - How To Respond to Notice of Error

A Servicer Has Three Options on How to Respond to a Notice of Error:

Option One: Provide a Response that corrects the Error;

Option Two: Provide a Response that does not correct error and demonstrates a *reasonable investigation* was conducted to support response; or

Option Three: DO NOTHING!!! (Wrong option)

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REGULATION X Basics - Servicer Not Required to Respond

Response not required:

- Alternative compliance - **12 C.F.R. §1024.35(f)**
- Two Major Exceptions to Response:
  - NOE is overbroad
  - NOE is untimely

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REGULATION X - When to Use RFIs/NOEs

- RESPA escrow mistakes
- RESPA errors in boarding loans on transfer of servicing
- TILA failure to apply payment to principal, interest and escrow
- RESPA holding money in suspense
- RESPA failure to implement final cure from completed Chapter 13 bankruptcy
- RESPA failure to provide documents pursuant to RFI
- RESPA failure to respond to NOE in a timely manner
- RESPA lack of diligence in loan modification process
- RESPA inaccurate fees or corporate advances (late fees, inspection fees, appraisals, legal fees)
- RESPA screw-ups related to securing allegedly abandoned homes
- RESPA failure to allow for an appeal of loss mitigation denial
- RESPA failure to properly review for loss mitigation.
- RESPA wrongful imposition of escrow.

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REGULATION X - Areas to Know as a Bankruptcy Attorney

- FORECLOSURE/DUAL TRACKING
- LOSS MITIGATION
- POST-PETITION DISBURSEMENTS OF MORTGAGE PAYMENTS - CONDUIT/NON-CONDUIT
- NOTICES OF PAYMENT CHANGE
- RULE 3002 Notice of Final Cure

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REGULATION X - Dual Tracking

- 1024.41(f) states that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:
  - (i) A borrower's mortgage loan obligation is more than 120 days delinquent;
  - (ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
  - (iii) The servicer is joining the foreclosure action of a subordinate lienholder.

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REGULATION X - Dual Tracking/Foreclosure Referral

The commentary states:

- i. Where foreclosure procedure requires a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (e.g., a complaint, petition, order to docket, or notice of hearing).
- ii. Where foreclosure procedure does not require an action or court proceeding, such as under a power of sale, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process.

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REGULATION X - Dual Tracking/Foreclosure Referral

- iii. Where foreclosure procedure does not require any court filing or proceeding, and also does not require any document to be recorded or published, a document is considered the first notice or filing if it is the earliest document that establishes, sets, or schedules a date for the foreclosure sale.
- iv. A document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure.

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REGULATION X - What do I do if I think there is dual tracking

- New Filers may have been Dual Tracked.
- Claims Must Be Scheduled
- Having to File Bankruptcy would be Damages

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REGULATION X - Loss Mitigation

ONE BITE AT THE APPLE RULE:

A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

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REGULATION X - Loss Mitigation

- Prohibition on foreclosure sale. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:
  - (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

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REGULATION X - Loss Mitigation

- (2) The borrower rejects all loss mitigation options offered by the servicer; or
- (3) The borrower fails to perform under an agreement on a loss mitigation option.

- A servicer not moving for foreclosure judgment includes:
  - Not moving for summary judgment
  - Not moving for default judgment of the borrower currently be considered for loss mitigation
- A servicer must take reasonable steps to avoid a ruling on a pending motion that would result in a foreclosure judgment against a borrower

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REGULATION X - Loss Mitigation - 37 Day Rule

- If a complete loss mitigation application is received less than 37 days before a scheduled foreclosure sale, a servicer is under no obligation to conduct a loss mitigation review. See 1024.41(c)(1).

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REGULATION X - Loss Mitigation - What is an Application

- A lender is under no obligation to review a borrower without a request for loss mitigation.
- If a borrower makes a request for loss mitigation, to what extent can the Regulations be triggered?
- Section 1024.31 defines a loss mitigation application as:
  - "an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option."
  - "Loss mitigation option means an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower."

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REGULATION X - Loss Mitigation - What is a Complete Application

- Pursuant to Section 1024.41(c), If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, it is required to, within 30 days of the date the application was considered complete:
  - (i) Evaluate the borrower for all loss mitigation options available to the borrower; and
  - (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage.

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REGULATION X - Loss Mitigation - What is a Complete Application

- Under Section 1024.41(c)(2)(iv), where an application is considered facially complete upon the first review and the borrower is informed of the same in the "five day letter" required under 1024.41(b)(2)(i)(B), but it is later determined that information is missing, presuming the borrower timely provides a complete package, the lender is required to consider the application "complete" as of the date it was facially complete.

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REGULATION X - Loss Mitigation - What is a Complete Application

- What does this mean? If a lender receives a loss mitigation package and determines it is facially complete on April 1st, but later determines it is incomplete on April 15th, so long as the borrower provides the missing documentation within a reasonable period, the evaluation must be complete under 1024.41(c)(1).

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REGULATION X - Loss Mitigation - Appeal of Denials

- Under Section 1024.41(h), a servicer is required to let the borrower to appeal the denial of any trial or permanent loan modification offers if it is issued 90 days or more before a foreclosure sale (or during the 120 period before the matter can be referred to foreclosure).
    - The servicer is required to give the borrower 14 days to appeal.
    - Pursuant to 1024.41(h)(3), an appeal must be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

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REGULATION X - Loss Mitigation - Appeal of Denials

- Notice must be given to the borrower.
- The stay on foreclosure remains in place during the appeal.
- The borrower may also send a NOE.
- The servicer is required to provide a response to the appeal within 30 days. See 1024.41(h)(4).
    - The borrower shall be given 14 days to accept or reject any offers.

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Credit Reporting

- Ordering Client's Credit Reports:
  - Annualcreditreport.com - All Three Bureaus
    - https://www.annualcreditreport.com/requestReport/requestForm.action; or
    - https://www.annualcreditreport.com/manualRequestForm.action
- Reviewing Credit Reports:
  - Loan Balance
  - Last Payment Reported Paid
  - Amounts Due
  - Current Status of Loan

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Other Pre-Filing Considerations for Potential Claims

- FORECLOSURE PLEADINGS
  - What is the Amount of Judgment?
  - What is Date of Delinquency?
  - Look at the Mortgages, Assignments of Mortgages and Loan Modifications attached
- MORTGAGE STATEMENTS
  - What is Monthly Payment?
  - What is Statement Listing for Last Missed Payment?

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Post-Filing Claims - Mortgage Issues

- Escrow Mistakes
- Proof of Claim Pre-Petition Escrow Calculations
- Proof of Claim Post-Petition Escrow Calculations
- Application of Mortgage Payments during Chapter 13
- 3002.1
- Servicer Errors With Servicing Transfers
- Math Problems
- Other Loan Boarding Errors
- Modification Errors
- Failure to Timely Review Documents
- Failure to Timely Review Appeal
- Failure to Board Permanent Modification

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Post-Filing Claims - Rule 3002.1 and you

- In a perfect world, mortgage creditor should…
  Timely file accurate proof of claim for prepetition arrearage
  Properly calculate postpetition PITI payment
  Apply payments in accordance with confirmed plan
  Conduct annual escrow account analysis that reflects payments made under confirmed plan
  Send accurate payment change notices, with attachments for RESPA escrow account statement or TILA rate change notice
  Timely file accurate response to notice of final cure
  Conduct a case closing audit

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Post-Filing Claims - Rule 3002.1 and you

AND MEANWHILE IN THE REAL WORLD, MORTGAGE SERVICERS ROUTINELY FAIL TO DO MAY OF THESE THINGS

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Post-Filing Claims - Rule 3002.1, why your carrier thinks it is important

Recent trend of chapter 13 Trustees seeking denial of discharge for failure to maintain post-petition mortgage payments:

- In re Gonzales, 532 B.R. 828 (Bankr. D. Colo. June 9, 2015); In re Formaneck, 534 B.R. 29 (Bankr. D. Colo. July 13, 2015); In re Cherry, 10-25318 TBM (Bky. D. Colo. Jan. 19, 2016) (granting time to cure default); In re Payer, 2016 WL 5390116 (May 5, 2016) (granting time to cure default); In re Diggins, 561 B.R. 782 (Bankr. D. Colo. Dec. 20, 2016) (loan modification satisfied "all payments" requirement).
- In re Foster, 670 F.2d 478 (5th Cir.1982)
- In re Perez, 339 B.R. 385, 390 n. 4 (Bankr. S.D. Tex. 2006); In re Kessler, 2015 WL 4726794 (Bankr. N.D.Tex. June 9, 2015); In re Hankins, 62 B.R. 831, 835 (Bankr. W.D.Va.1986); In re Russell, 458 B.R. 731, 739 (Bankr. E.D.Va.2010).

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Post-Filing Claims - Rule 3002.1, Application of Payments

Rake v. Wade, 508 U.S. 464, 473 (1993) ("As authorized by § 1322(b)(5), the plans essentially split each of respondent's secured claims into two separate claims-the underlying debt and the arrearages.")

Once plan is confirmed, postpetition "maintenance" payments should be applied in accordance with original loan amortization as if no prepetition default exists

Payments on arrearages are paid separately, disbursed by the trustee, and should be applied only to arrearages
In re Ogden, 2016 WL 1077355 (D. Colo. Mar. 18, 2016) (affirming actual and punitive damages award against servicer, noting that servicer maintained two sets of books in accounting for debtor's post petition mortgage payments, which caused the debtor to be treated as not "contractually current").

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Post-Filing Claims - Payment Change Notices

If change based on escrow account or adjustable rate mortgage, mortgage creditor must attach to Supplement 1 an escrow account statement or rate change notice prepared in form consistent with RESPA and TILA

Pay attention to escrow change at first year anniversary!

Is the "present payment" shown on the first change statement the same as the "new payment" on statement filed on petition date?

Date fees, expenses and charges are "incurred" under Rule 3002.1(c) is the date the service is performed, not the date the servicer was invoiced by the third-party service provider. In re Raygoza, 556 B.R. 813 (Bankr. S.D. Tex. 2016)

What if fee is "tracked" but not noticed, and case later dismissed?
In re Owens, 2014 WL 184781 (Bankr. W.D.N.C. Jan. 15, 2014)

What if fee is "waived" and not noticed, but keeps reappearing?
In re Gravel, 556 B.R. 561 (Bankr. D. Vt. 2016)

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Post-Filing Claims - Payment Change Notices

In re Kraska, 2012 Bankr. LEXIS 1647 at *4-6 (Bankr. ND OH 2012) (J. Kendig):

To meet its intended goals, the new rule provides the procedure for a creditor to provide notice of payment changes, see Fed.R.Bankr.P. 3002.1(b), and postpetition fees, expenses and charges assessed on an account. Fed.R.Bankr.P. 3002.1(c). Subsection (d) governs the form and content of the creditor notices, while subsection (e) establishes the procedure for determining whether any fee, expense or charge under subsection (c) is allowable. The balance of the rule covers the final cure payment on arrearage claims and effect of a creditor's failure to provide notice under the rule. A failure to notice applicable changes may result in prejudice to the creditor. Fed.R.Bankr.P. 3002.1(i)....
As the court sees it, part of the point of Rule 3002.1 is to provide a procedure for the filing of an accurate mortgage claim. Here, this may be particularly important to Debtor because there is a possibility that this is a one hundred percent plan

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Post-Filing Claims - Notice of Final Cure, What's A Debtor to Do?

In re Bodrick, 498 B.R. 793 (Bankr. N.D. Ohio 2013) (J. Woods) – court rejected creditor argument that rule provides the exclusive procedure for a court determination or that debtor is estopped from seeking a determination in an adversary proceeding filed after the twenty-one day period expired

In re Hockenberger, 2018 Bankr. LEXIS 1120 (Bankr. N.D. OH 2018) (J. Whipple) - statements filed pursuant to Rule 3002.1(g) have no prima facie evidentiary effect and no presumptive validity.

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Post-Filing Claims - Notice of Final Cure and Possible Claims

- Rule 3002.1(i) sanctions
- Section 105 sanctions (and court's inherent powers)
- Contempt of confirmation order
- Section 524(i) violation
- FDCPA or state debt collection statute violation
- FCRA violation
- TILA prompt crediting rule violation
- RESPA notice of error violation
- State UDAP statute violation
- Breach of implied covenant of good faith and fair dealing

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Post-Filing Claims - Notice of Final Cure and Possible Claims

In re Mocella, 2016 Bankr. LEXIS 2477 (Bankr. ND OH 2016) (J. Woods) - Rule 3002.1 contains its own set of remedies for seeking damages for violation of the automatic stay

In re Luzier, 580 B.R. 725 (Bankr. ND OH 2014) (J. Woods) - Mr. Cooper precluded from presenting evidence related to information that should have been included in its Notice of Final Cure (which Mr. Cooper failed to object) and further hearing on damages set.

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Post-Filing Claims - Notice of Final Cure and Possible Claims

What about other relief like punitive damages?

In a post Taggart world - good question under 11 U.S.C. 105

In re Gravel, 601 B.R. 873 (Bankr. Vt. 06/27/2019) -
A central issue in the rationale of the Remand Decision is the circuit split with respect to bankruptcy courts' power to impose punitive sanctions. The District Court rejected the First and Eighth Circuits' conclusion that bankruptcy courts possess the broad authority to impose punitive sanctions for violation of a court order. See In re Charbono, 790 F.3d 80, 87 (1st Cir. 2015) (finding bankruptcy courts have the same authority as other federal courts to issue punitive non-contempt sanctions for failures to comply with their orders); Isaacson v. Manty, 721 F.3d 533, 538-39 (8th Cir. 2013) (finding the bankruptcy court had inherent power, like other [*891] federal courts, to issue a punitive, non-compensatory, penalty for a party's factually unsupported and harassing statements). The District Court found these interpretations of bankruptcy court authority to be too expansive and without adequate jurisprudential support. Instead, it endorsed the conclusions the Ninth, Fifth, and Sixth Circuits have reached, which "favor the narrower construction of the Bankruptcy Court's statutory and inherent punitive sanctions power" (doc. # 104, p. 16) (citing In re John Richards Homes Bldg. Co., 552 F. App'x 401, 415-16 (6th Cir. 2013); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003); In re Hipp, Inc., 895 F.2d 1503, 1510 (5th Cir. 1990)). Relying on this narrower construction, the District Court held that while "the statutory and inherent powers of the Bankruptcy Court are not sufficient to support [the] imposition upon PHH of $300,000 in punitive sanctions[,] ... [the Bankruptcy Court] may refer the matter to the district court" or "take steps to enforce its orders short of punitive sanctions of the scope and type imposed in these cases" (doc. # 104, p. 16-17) (emphasis added).

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QUESTIONS

ABI CPEX 2022
Mortgage Loss Mitigation Options in the Wake of the Pandemic

By: Christopher Hawkins
Bankruptcy Judge
United States Bankruptcy Court
Middle District of Alabama

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was signed into law on March 27, 2020, in response to the COVID-19 pandemic, and it provided at least some form of financial assistance to nearly all participants in the American economy. The Consolidated Appropriations Act (the "CAA") was signed into law on December 27, 2020, and it supplemented many of the programs established under CARES Act. The COVID-19 Bankruptcy Relief Extension Act (the "Extension Act") was signed into law on March 27, 2021, and it extended certain bankruptcy-related provisions of the CARES Act and CAA to March 27, 2022.

Between the CARES Act, CAA, and Extension Act (collectively, the "COVID Relief Acts"), homeowners had access to various forms of temporary relief, including a moratorium on foreclosures with respect to federally backed mortgage loans and forbearance for up to 18 months, provided that the borrowers attested that COVID-19 had caused a financial hardship. Under a forbearance, the mortgage lender or servicer allows a borrower to pause mortgage payments. The COVID Relief Acts provided that during the forbearance period, the borrower would not incur fees, penalties, or additional interest (beyond the scheduled amounts). There were no bankruptcy-related restrictions with respect to forbearances under the COVID Relief Acts.

While these forbearances under the COVID Relief Acts provided borrowers a breathing spell, the underlying payments were not forgiven or otherwise addressed. These forbearances, in essence, were simply "kicking the can down the road," leaving the corresponding payment defaults to be dealt with later. From a bankruptcy perspective, the COVID Relief Acts permitted mortgage lenders and servicers to supplement their proofs of claim to account for the post-petition delinquencies caused by the

forbearances and permitted borrowers to extend the term of their confirmed plans to account for interruptions in payments during the pandemic.

The COVID Relief Acts have expired, and borrowers that took advantage of forbearances related to COVID-19 face significant challenges in addressing the payment gaps related to their mortgages. Given that Chapter 13 debtors generally must cure mortgage defaults prior to the expiration of their plan's applicable commitment period, bankruptcy alone might not provide a sufficient framework for dealing with these payment gaps. Fortunately, not all hope is lost, as applicable non-bankruptcy law provides borrowers with a mechanism for exploring options to get their mortgage loans back on track.

Loss Mitigation under Regulation X

Regulation X, which implements the Real Estate Settlement Procedures Act, was overhauled by the Consumer Financial Protection Bureau (the "CFPB") in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act. The requirements in Regulation X addressing a mortgage servicer's handling of loss mitigation applications took effect on January 10, 2014, and, apart from certain adjustments related to COVID-19, remain largely unchanged.[1]

Regulation X defines "loss mitigation option" as any alternative to foreclosure that a servicer can offer on behalf of the owner or assignee of the loan, which may include refinancing, trial or permanent loan modifications, repayment of the amount owed over an extended period, forbearances, short sales, and deeds-in-lieu of foreclosure. Notably, any time a borrower verbally, or in writing, requests an alternative to foreclosure and provides any information that the servicer could evaluate, the servicer is considered to have received a loss-mitigation application.

Upon receipt of an application, a servicer must evaluate the documents and information provided by the borrower and, within five business days, send the borrower an acknowledgment letter stating whether the borrower's application is complete or incomplete. If the application is determined to be

[1] With respect to the loss mitigation provisions, *see* Regulation X, Section 1024.41.

incomplete, the acknowledgment letter must contain the information or documents needed to complete the application and a reasonable date by which the borrower should submit what is missing.

If a complete application is received more than 37 days before a scheduled foreclosure sale, or when no sale is scheduled, the servicer must, within 30 days, evaluate the application for all loss-mitigation options that are available to that borrower and send a written notice stating the options, if any, it is able to offer. The determination notice must also contain a deadline for accepting or rejecting any offered options and specific reasons for the denial of any loan modification options.

If the application was made complete 90 days or more before a scheduled foreclosure sale, or if no sale was scheduled at that time, the servicer must give the borrower at least 14 days to appeal the denial of any loan-modification options. If the borrower does appeal, the servicer must have different personnel re-evaluate the loss-mitigation application. Within 30 days of the borrower's appeal, the servicer must complete the re-evaluation and provide the borrower notice of its new determination.

Regulation X provides a framework for homeowners to explore possible alternatives to foreclosure, including additional forbearances. Moreover, the CFPB continues to issue directives and guidance to servicers with respect to adequate staffing of the servicers' loss mitigation departments and procedural safeguards associated with the loss mitigation application process. The fact that a borrower is a debtor in a bankruptcy case does not prevent that borrower from applying for loss mitigation assistance, and it does not alter the timelines and requirements imposed on mortgage servicers.

Interplay with the Bankruptcy Code and Local Practice

If a borrower is in bankruptcy and has applied for loss mitigation assistance pre-confirmation, it may be worthwhile to incorporate any servicer-approved loss mitigation option into the proposed plan, which should ease the administrative burden on all parties involved. If the borrower has applied for loss mitigation assistance post-confirmation, the next step will vary based on the nature of the loss mitigation option offered by the servicer. For a deed in lieu of foreclosure, a motion to approve an agreement related

to relief from stay under may be the best procedural approach. For short sale, a motion to sell likely would be appropriate. If the servicer has approved a loan modification, courts will vary in their preferences. Some may require a motion to approve the modification agreement while others may prefer a modification to the plan. If the post-petition arrearage is being rolled into the modified loan, and amended proof of claim also may be necessary. Finally, a substantial number of bankruptcy courts have implemented mortgage modification programs that may impose additional requirements on the debtors and creditors, including the use of a portal for the exchange of information related to the loss mitigation application. On the bright side, many courts recognize the time and expense incurred by the parties and their counsel and will approve additional fees for counsel that have assisted in the modification of the loan.

Conclusion

Homeowners, having been provided helpful but temporary tools during the height of the pandemic, now face significant challenges in bringing their mortgage loans current. The tools provided by the COVID Relief Acts no longer are available, and the provisions of the Bankruptcy Code may, in and of themselves, be limited in their effectiveness in terms of curing substantial payment shortfalls resulting from forbearances. Borrowers and their counsel have an opportunity to work with mortgage servicers and their counsel to explore loss mitigation options pursuant to the procedures set forth in Regulation X. To the extent the parties can agree on a loss mitigation option, most courts will be happy to consider such options in accordance with the Bankruptcy Code and their local rules.

Faculty

Brian D. Flick is the managing partner of The Dann Law Firm's Cincinnati office in Milford, Ohio, where he focuses his practice in consumer law in Ohio, Kentucky and across the U.S. His practice areas include consumer bankruptcy debtor representation in the areas of chapters 7, 12 and 13, consumer fraud, real estate litigation, foreclosure defense, student loan debt defense, bankruptcy litigation and mortgage servicing litigation under the Real Estate Settlement Procedures Act and the Truth in Lending Act. Since beginning the practice of law, he has been very active in local and national attorney associations. Mr. Flick is active with the Cincinnati Bar Association's Bankruptcy Committee, and he sits on the Volunteer Lawyers Committee for the Cincinnati Bar Association. He also is the current Sixth Circuit Listserv Moderator for the National Association of Consumer Bankruptcy Attorneys and the current Ohio State Chair for the National Association of Consumer Advocates, both positions he has held since May 2017. In addition, he was appointed by the Board of Trustees as a member of the Unauthorized Practice of Law Committee of the Cincinnati Bar Association in June 2017. Mr. Flick has been a frequent speaker at Cincinnati Bar Association, NACBA and NACA events since 2014, and he has assisted with DannLaw's Regulation X and Z Seminars, which have taken place since 2016. In addition, he serves as a facilitator for the SDOH Bankruptcy Mortgage Modification Program and a mediator with the SDOH Bankruptcy Court Mediation Program. Mr. Flick received his B.A. from Adrian College and his J.D. from the Ohio Northern University Petition College of Law.

Hon. Christopher L. Hawkins is a U.S. Bankruptcy Judge for the Middle District of Alabama in Montgomery, sworn in on March 14, 2022. Prior to his appointment, he was a partner at Bradley Arant Boult Cummings LLP, where he focused exclusively on bankruptcy and insolvency matters. For more than 20 years, Judge Hawkins represented debtors and creditors in out-of-court restructurings, commercial and consumer bankruptcy cases, bankruptcy litigation, and consumer bankruptcy compliance and regulatory enforcement matters. He recently completed a two-year term as co-chair of ABI's Consumer Bankruptcy Committee, and he is an adjunct professor at the Cumberland School of Law at Samford University. Judge Hawkins co-authored ABI's *Thorny Issues in Consumer Bankruptcy Cases* (2nd ed. 2020) and is a member of the 33rd Class of Fellows of the American College of Bankruptcy. Prior to taking the bench, he was listed in Chambers USA for Bankruptcy and Restructuring and was named in the 2022 edition of the *Lawdragon 500 Leading U.S. Bankruptcy and Restructuring Lawyers*. Judge Hawkins received his B.S. *summa cum laude* in 1996 from Spring Hill College and his J.D. *summa cum laude* in 1999 from the University of Alabama School of Law, where he was a member of the Order of the Coif, served on the *Alabama Law Review*, received the M. Leigh Harrison Award and was a Hugo Black Scholar.

Jon J. Lieberman is a partner at Sottile & Barile LLC in Loveland, Ohio, and has represented consumer debtors, commercial debtors, large and small creditors, mortgage lenders and servicers, automobile creditors and student loan creditors, as well as chapter 7 and 13 trustees. He has worked for some of the largest creditor firms in the region and is licensed to practice in Ohio, Kentucky, Indiana, Michigan, Colorado, Wisconsin and the District of Columbia. He is also able to practice in front of the Sixth Circuit Court of Appeals, the U.S. Court of International Trade and the U.S. Supreme Court. Mr. Lieberman served as co-chair of ABI's Consumer Bankruptcy and Legisla-

tion Committees, and he is currently Special Projects Leader of ABI's Commercial and Regulatory Law Committee. He also is an associate editor of the *ABI Journal*, co-chair of Outreach for ABI's Veterans and Servicemembers Affairs Task Force, former member of ABI's "40 Under 40" Steering Committee, and currently serves on the advisory board of ABI's Consumer Practice Extravaganza. He was selected as ABI's 2000 Committee Person of the Year, and he co-authored ABI's Thorny Issues in Consumer Bankruptcy Cases, Second Edition. Mr. Lieberman received his J.D. from the University of Cincinnati College of Law in 1990.