



# Federal Appeals Court Finds Mortgage Servicer Potentially Liable to Borrower

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A federal appeals court has issued one of the first opinions under new mortgage servicing rules that took effect in 2014, finding that a mortgage servicer may be liable for not properly responding to a borrower's notice of error on the borrower's mortgage account.

The May 12, 2016 opinion from the 11<sup>th</sup> Circuit United States Court of Appeals addresses the new mortgage servicing rules adopted by the Consumer Financial Protection Bureau. Those rules, which implement provisions of the Dodd-Frank Act, impose significant obligations on mortgage servicers, including the obligation to conduct a reasonable investigation upon receipt of a notice of error and to respond to the notice within certain time frames and with certain information. In this case, the 11<sup>th</sup> Circuit found that the plaintiff homeowner had stated plausible claims alleging that the mortgage servicer had violated the Real Estate Settlement Procedures Act ("RESPA"), as implemented by the mortgage servicing rules in Regulation X, by not properly responding to her billing error complaints, and failing to conduct a reasonable investigation. The court also found that the borrower adequately pled actual damages and statutory pattern-or-practice damages against the servicer.

The borrower, in this case, claimed that her monthly payment increased by about \$100 when a new servicer began servicing her mortgage loan. Suspecting that the service was either mistakenly charging the property tax or miscalculating the loan amortization schedule, the borrower sent the servicer a "notice of error" letter pointing out the increase, requesting an investigation, and demanding a refund if appropriate.

Because the borrower's "notice of error" satisfied requirements for a qualified written request asserting an error, it triggered the error resolution obligations imposed on servicers pursuant to RESPA and Regulation X. A qualified written request asserting an error is a written notice from the borrower that asserts an error regarding servicing of the loan. The written request must include the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred. The error resolution procedure requires servicers to respond to error complaints in a timely manner by either (1) correcting the errors identified by the borrower and providing a written notification of the correction with the effective date of the correction and contact information for further assistance, or (2) conducting a reasonable investigation and providing the borrower with (a) a written notification that includes a statement that the servicer has determined that no error occurred, (b) a statement of the reason or reasons for this determination, (c) a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, (d) information regarding how the borrower can request such documents, and (e) contact

information for further assistance.

In response to the borrower's notice of error, the servicer in this case attempted to take the second option by denying any error and using what the plaintiff called a "boilerplate" answer stating that the "loan and related loan and related documents were reviewed and found to comply with all state and federal guidelines that regulate them." This response letter did not give a detailed statement of the reason or reasons for this determination in response to the borrower's particular questions.

The Court of Appeals noted that "...RESPA, as a remedial consumer-protection statute, should be construed liberally...." In accordance with that position, the court found a viable allegation that the servicer did not provide an adequate explanation or supporting documents, stating that "[i]f servicers want to try to shelter behind their RESPA response letters, they must provide a more comprehensive, supported explanation of their findings...." Because the court found that the generic response letter did not meet the standards of a "written notification" that includes "reasons for [the servicer's] determination," there was a basis to find that the servicer's investigation was not reasonable.

The decision, in this case, indicates that courts may interpret the new mortgage servicing rules under RESPA somewhat liberally in favor of consumers. Mortgage loan servicers should ensure their error resolution practices adequately comply with the new rules, especially the letters and supporting documentation that is sent in response to error complaints. Servicers should also implement proper policies and procedures to ensure compliance with the rules.

If you have any questions regarding this case or new mortgage servicing rules under RESPA and Regulation X, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at [jsimon@cullenanddykman.com](mailto:jsimon@cullenanddykman.com), Kevin Patterson at 516-296-9196 or via email at [kpatterson@cullenanddykman.com](mailto:kpatterson@cullenanddykman.com), or Mandy Xu at 516-357-3850 or via email at [mxu@cullenanddykman.com](mailto:mxu@cullenanddykman.com).

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