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What RESPA Servicers Need to Know About Qualified Written Requests by Maurice L. Shevin

As initially enacted in 1974, the Real Estate Settlement Procedures Act (RESPA) did not have a great impact upon servicers. However, that began to change in 1990 with the Cranston-Gonzalez National Affordable Housing Act of 1990 Amendments to RESPA. This act imposed three general requirements on mortgage servicers: (1) notifying the borrower of servicing transfers; (2) responding to written inquiries from the borrower; and (3) making escrow payments when due. The notification to borrowers is a fairly straightforward procedure, with the language required for the noticing of servicing transfer provided by the regulation. Similarly, the requirement of the servicer to make prompt escrow payments is straightforward. However, it is the response to written inquiries from the borrower that has generated a great deal of controversy in the servicer community.

Section 3500.21(e) of Regulation X defines a “qualified written request” as follows:

A qualified written request means a written correspondence (other than notice on a payment coupon or other payment medium supplied by the servicer) that includes, or otherwise enables a servicer to identify, the name and account of the borrower, and includes a statement of the reasons that the borrower believes the account is in error, if applicable, or that provides sufficient detail to the servicer regarding information relating to the servicing of the loan sought by the borrower. A written request does not constitute a qualified written request if it is delivered to a servicer more than 1 year after either the date of the transfer of servicing or the date that the mortgage servicing loan was paid in full, whichever date is applicable.

This section also includes steps that must be taken by servicers in response to qualified written requests (QWR), which will be discussed in more detail below. A “servicer” is defined as “the person responsible for the servicing of a loan (including the person who makes or holds a loan if such person also services the loan).” Thus, if the original mortgagee never transfers servicing of their loan and receives a QWR more than a year after the loan is originated, my reading of the statute would lead me to believe that such a mortgagee would still be required to comply with the statute. Such a fact pattern would not fall under the one year exception because there has never been a “transfer of servicing” pursuant to the statutory language.

The primary indicators of a qualified written request are that the borrower clearly identifies himself/herself, gives an account number or other number that could be used to identify the account in question, and sufficiently states the reasons for the borrower’s belief that the account is in error. Courts have held that every written correspondence sent to a servicer cannot automatically be regarded as a QWR, because that determination is considered to be an individualized inquiry, evaluated on a case by case basis.

A written correspondence from a debtor must also seek information relating to the “servicing” of the loan to be considered a QWR. Servicing is defined in RESPA as “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 10, 12 U.S.C. §2609, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.”

When a servicer receives a letter from a debtor, the letter must meet the above criteria to be considered a QWR and thus be subject to RESPA. The letter must identify the name of the borrower, include an account number or some other reasonable means of identifying the account, and include the debtor’s reasons why the account is incorrect. The statute and regulations also require that the debtor’s inquiry be related to servicing the loan — basically ensuring that the payments are made properly. For example, a debtor’s letter that contains inquiries about forged deeds, legal descriptions, or recording information and makes no other reference to servicing would most likely not be defined as a QWR.

When a servicer receives a QWR from a debtor, it must take appropriate action. First, the servicer must acknowledge in writing receipt of the QWR within 20 days of receiving the letter. Then, within 60 days of receiving the letter, the servicer must do one of three things:

- (1) Correct the borrower’s account and inform the borrower of these corrections in writing, which written notification must include the name and telephone number of a representative of the servicer who can provide assistance to the borrower
- (2) Investigate and provide the borrower with a written explanation that includes the reasons the servicer believes the account is correct and the name and telephone number of an employee, office or department of the servicer that can provide assistance to the borrower, or
- (3) Investigate and provide the information requested by the borrower or a written explanation to the borrower of the reasons the servicer cannot obtain the information the borrower is requesting if that information cannot be obtained, and the name and telephone number of an employee, office or department of the servicer that can provide assistance to the borrower.

In addition, during this 60 day period, the lender *may not* provide information to consumer reporting agencies regarding the borrower’s overdue payment.

The analysis regarding a lender or servicer’s response to a QWR is based on views from multiple jurisdictions that “Congress intended RESPA to be a remedial consumer-protection statute. As such, RESPA is to be construed liberally in order to best serve Congress’ intent”. The case I mentioned above that analyzes the regulations and qualified response letters is a 1999 case from the U.S. District Court in the Middle District of Alabama, *Rawlings v. Dovenmuehle Mortgage*. The plaintiff in *Rawlings* brought suit against the mortgage servicer under RESPA, alleging numerous violations including failing to respond to QWRs. The court found that the correspondence did constitute QWR, and granted Plaintiff’s motions for summary judgment relating to this issue. The court also awarded the plaintiff actual damages resulting from travel and correspondence to the servicer, and held that mental anguish damages were recoverable as actual damages.

The plaintiff in *Rawlings* had sent the servicer a number of letters, and the servicer argued to the court that it had acknowledged some of them in writing within the required twenty day period. In addition, the servicer argued that it was unable to respond within the 20 day period to some letters because it was unable to receive the information it needed from other servicers, which affected its time frame. The court shot down each argument, holding that the servicer had failed to comply as a matter of law, and that the acknowledgements that were sent out should have referenced the date of the debtor’s letter that the servicer was responding to.

The *Rawlings* court then turned its attention to damages allowed under the regulations, and its analysis here is often cited by courts in other jurisdictions. Citing the statute, the court held that plaintiffs were entitled to actual damages for correspondence and travel. The court also refused to grant servicer’s summary judgment motion regarding the plaintiff’s damages for time away from work. Relying on testimony from the plaintiff that he had suffered “mental aggravation,” a “boiling temper,” and that he was “real upset” and “bothered” by the servicer’s failure to timely respond to his communications, the court held that mental anguish damages were recoverable. “In light of Congressional intent as demonstrated in both RESPA’s statutory language and legislative history, as well as other courts’ construction of damages provisions in other remedial consumer protection statutes, the court finds that the term ‘actual damages’ as used in §2605(f) of RESPA encompasses mental anguish damages.”

The U.S. District Court in Pennsylvania cited *Rawlings* in holding that “actual damages” under RESPA and Regulation X encompass “compensation for any pecuniary loss including such things as time spent away from employment while preparing correspondence to the loan servicer, and expenses for preparing, photocopying and obtaining certified copies of correspondence.” In a later case regarding the subject regulations, the U.S. District Court in Illinois specifically cited the above language from *Cortez* in upholding actual damages, and relied on *Rawlings* in finding that mental anguish damages associated with late fees, foreclosure and time for correspondence were recoverable. This same court held for the debtor in a 2002 case where the debtor had filed suit *before* the expiration of the 60 day period given to servicers in the statute to remedy the issue. The court held that mental anguish the latest QWR within the required 20 days, and its argument was that the most recent letter was a litigation strategy taken in order to circumvent the Federal Rules of Civil Procedure. Although the court found this defense “persuasive” it still refused to grant the servicer’s motion to dismiss because the plaintiff’s letter qualified as a QWR under RESPA.

The language of RESPA and Regulation X each contain the following language:

ACTION WITH RESPECT TO INQUIRY.. Not later than 60 days (excluding legal public holidays, Saturdays and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall...

This language precedes the three options above that lenders may take within 60 days of receipt of a QWR. In the context of the receipt of a last minute QWR letter on the date of a foreclosure sale, this language provides some guidance, although there is little case law directly on point.

In *Cardiello v. The Money Store*, the debtor’s RESPA claims against the defendant lender were ultimately dismissed by the U.S. District Court in the Southern District of New York. The debtor sent the lender a QWR dated June 8. The lender responded properly by acknowledging receipt of the letter within 20 days, and subsequently fulfilled its second obligation by sending a response letter dated July 17 (well within 60 days) that provided the information requested by the debtor and the required contact information. During its investigation, the lender sent demand letters to the debtor dated June 13 and June 21, and the debtor alleged that these letters violated RESPA because the lender was “taking action with respect to the inquiry of the borrower” before providing them with the response letter dated July 17.

Although the court reiterated RESPA’s purpose as a consumer protection statute, it held that these letters did not violate RESPA. However, the court interpreted the statute above, in particular the phrase “action with respect to the inquiry of the borrower,” to mean that “a lender cannot take an adverse action against the borrower, related to a qualified inquiry, before responding to the inquiry.” RESPA was not violated in this case because the demand letters the lender had sent to the debtor simply did not meet the adversity threshold the court had just established. Holding that “lenders cannot correspond with borrowers about an inquiry at all until they have investigated it fully would create a needless technical obstacle unrelated to the statute’s objectives.”

Lenders who complied with the statute could therefore send out additional demand letters in the course of their investigation of the debtor’s claims, and this practice would not be considered “action with respect to the inquiry” of the debtor for RESPA purposes. However, the court noted that such prohibited actions “might well include commencing foreclosure proceedings against the borrower or suing the borrower.”

An unpublished case from the Superior Court of Connecticut addressed this issue a few months after *Cardiello*. In *Webster Bank v. Linsley*, Webster Bank instituted strict foreclosure against the debtor, who in turn alleged RESPA violations as a “special defense” against the foreclosure and also counterclaimed for wrongful foreclosure. The court granted Webster Bank’s motion to sever the counterclaim from the special defense, thus allowing the foreclosure to proceed and continuing the wrongful foreclosure counterclaim for a later date (additional searches did not reveal further case proceedings). In his special defense to the foreclosure, the debtor argued that Webster had violated RESPA by failing to answer her qualified written requests. The debtor argued that compliance with RESPA was a mandatory condition precedent to foreclosure and that the lender was therefore precluded from its foreclosure action for failure to comply.

The court held for the lender, stating the following: “...this special defense is legally insufficient because a violation of RESPA is not a valid defense to a mortgage foreclosure. A violation of RESPA, by the terms of the act, does not discharge the debt or invalidate the note and mortgage and therefore, does not provide a defense to foreclosure.” However, while the court allowed the foreclosure to proceed, it allowed the debtor’s counterclaim for wrongful foreclosure to proceed at a later date, stating that “although the RESPA violations do not discharge the mortgage debt and provide no defense to mortgage foreclosure, they are actionable.”

The *Webster* case is unpublished, and is entitled “Memorandum of Decision Re Motion to Strike and Motion to Sever Counterclaim.” It does, however, contain the most direct language found on RESPA, QWRs and foreclosure actions. In light of the case law, servicers should treat most written correspondence from a debtor as a qualified written response. Although there are basic requirements under the statute as described above, the case law and particularly the courts’ view of RESPA as a remedial and protective statute lead one to believe that it would be difficult to argue that a written letter from a debtor is not a QWR. The main things that have to be included are basically a name, account number and why the debtor thinks there is an error. The servicer is obligated to send a written acknowledgment to the debtor that they did in fact receive the letter within 20 days. This is simply a receipt, and the main investigation does not have to be completed for 60 days. A written acknowledgement should be sent within 20 days and contain only a brief message that the communication has been received (not referencing the letter as a QWR), and reference the date of the debtor’s communication.

The law does state that the inquiry must relate to the servicing of the loan. Even if the debtor’s letter is found not to relate to servicing, i.e. the letter asks about legal descriptions, recordings, estates, etc., this can be determined in the 60 day period allowed to the servicer, and our clients will be in compliance with their duty under RESPA by simply acknowledging their receipt of the original correspondence within 20 days.

As mentioned previously, once the servicer has acknowledged receipt in writing, it must proceed in one of three ways:

- (1) Correct the borrower’s account and inform the borrower of these corrections in writing, which written notification must include the name and telephone number of a representative of the servicer who can provide assistance to the borrower
- (2) Investigate and provide the borrower with a written explanation that includes the reasons the servicer believes the account is correct and the name and telephone number of an employee, office or department of the servicer that can provide assistance to the borrower, or
- (3) Investigate and provide a written explanation to the borrower of the reasons the servicer cannot obtain the information the borrower is requesting if that information cannot be obtained. When one of these options is utilized and completed, the borrower must receive their second written communication (the first being the acknowledgement of receipt letter due within 20 days) within 60 days of receipt of the borrower’s original correspondence.

There is another nuance to the receipt of a QWR that deserves attention. This involves the situation where the debtor delivers a QWR a few days (or hours) before a scheduled foreclosure sale is to take place. As discussed above, a creditor may not take adverse action against the debtor before responding to the QWR.

Foreclosure proceedings would constitute “adverse action,” and as a result could result in actual damages for mental anguish. However, there is a section of the regulations that might be helpful in the event a QWR is received right before a sale.

Section 3500.21(e)(4)(ii) reads as follows:

In accordance with section 17 of RESPA (12 U.S.C. 2615), the protection of credit rating provision of paragraph (e)(4)(i) of this section does not impede a lender or servicer from pursuing any of its remedies, including initiating foreclosure, allowed by the underlying mortgage loan instruments.

Section 17 of RESPA reads:

Nothing in this chapter shall affect the validity or enforceability of any sale of real property or any loan, loan agreement, mortgage or lien made or arising in connection with a federally related mortgage loan.

While Regulation 3500.21 forbids a lender from taking any adverse action against the debtor with respect to credit reporting agencies while in the course of answering a QWR in the 60 day time frame, the exception above in (e)(4)(ii) allows a lender to proceed with the remedies afforded it under the mortgage agreement, including foreclosure. Furthermore, section 17 of RESPA protects the validity and enforceability of the mortgage instrument, which would include the power of sale afforded to the lender in the mortgage. Of course, the most prudent course of action is for the servicer to postpone the sale, confer with local counsel and respond to the QWR before conducting the sale.