The CFPB’s Mortgage Servicing Rules: Where Are We Now?

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Introduction

Alan S. Wolf is the President and Managing Attorney of The Wolf Firm, A Law Corporation. Mr. Wolf has served as the Chair of the California Mortgage Bankers Association Legal Services Committee (1994-1995) and Co-Chair (1995-1996), helped found the USFN (the preeminent national association of mortgage banking law firms), and served as a member of the USFN Board of Directors (1990-1996). Mr. Wolf was the lead attorney in the landmark bankruptcy cram down case of Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165 (9th Cir. Cal. 2004). Mr. Wolf lectures extensively throughout the country on a variety of loan servicing and mortgage banking issues and has been a featured speaker at numerous MBA National Legal Issues and Regulatory Compliance conferences and National Servicing conferences. He has also written many articles for leading mortgage banking trade journals including Mortgage Banking Magazine, Servicing Management, California Finance, the CTA Newsletter and USFN Report and has authored sections in the Mortgage Bankers Association’s Handbook on Loan Administration and two chapters in the Mortgage Servicers National Reference Directory.
CFPB History

July 21, 2010 - Dodd-Frank Act signed into law
January 17, 2013 - Final Mortgage Servicing Rules
October 23, 2013 - Interim Rule

Exempts having to send mortgage statements during bankruptcy or after discharge

January 10, 2014 - Mortgage Servicing Rules- Effective Date
December 15, 2014 - Proposed Amendments to Mortgage Servicing Rules
April 26, 2016 - Results of Consumer Testing of Periodic Statements in Bankruptcy
March 16, 2015 - Comment Period for Periodic Statements Expired
July 28, 2016 – Proposal to overhaul the debt collection market released

July 29, 2016 – Proposed amendments to the Know Before You Owe rules released

July 29, 2016 – Federal Register notice proposing to would allow consumers to rate companies’ responses to complaints that are submitted through the CFPB portal

August 2, 2016 – CFPB’s releases “Principles for the Future of Loss Mitigation”

August 4, 2016 - Final Amendments to Mortgage Servicing Rules
October 19, 2017 - Effective Date- Most Amendments
April 19, 2018 - Effective Date- Periodic Statements and Successors in Interest
Final Amendments to Mortgage Servicing Rules
August 4, 2016

1. Definition of Delinquency
2. Periodic Statements
3. Loss Mitigation
4. Early Intervention
5. Servicing Transfer
6. Successors in Interest
7. Force-Placed Insurance and Information Requests
8. Small Servicer Definition
What Will We Cover

Focus of Presentation

• Definition of Delinquency
• Periodic Statements
• Early Intervention
Definition of Delinquency

Current Rule
• Delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before being assessed a late fee
• Definition limited to sections 1024.39 and 1024.40

Amended Rule
• A borrower and a borrower’s mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due an unpaid
  ▪ Servicers may incorporate payment tolerance
• Definition applies to the mortgage servicing subpart of Regulation X (subpart C) and 1026.41
Statements During Bankruptcy

Current Rule
• Servicer is exempt from sending statements during a pending bankruptcy and after discharge of a debt.

Proposed Rule
• Servicer is generally not exempt from sending statements despite a pending bankruptcy and despite discharge of a debt
  • Very complex formulas in determining whether or not statements must be sent.
  • Exemption applies at the consumer level, not the loan level
  • Exemption can only be triggered by the Court’s confirmation of the plan.
Amended Rule- Slightly better than Proposed Rule

- Servicer is generally not exempt from sending statements despite a pending bankruptcy and despite discharge of a debt
  - CFPB wants statements sent if any indicia that the borrower intends to keep the property
  - Generally exempt from sending statements in limited instances where it would be a stay violation
- Notice Sent to Debtors (§ 1026.41(e)(6)) will require additional disclosures.
  - That Servicer will no longer provide the consumer a periodic statement for each billing cycle.
  - That the lien on the residence remains in place and that the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes.
- Two sets of statements
  - Chapter 12/13
  - Chapter 7/11
Exempt- You Don’t Need to Send Mortgage Statements If...

• Loan level analysis- Servicer is exempt with respect to all consumers on a mortgage loan if the exemption criteria are met with respect to any borrower on the loan.
• A judge’s order trumps everything:
  • Judge orders statements sent (not exempt)
  • Judge orders statements not be sent (exempt)
• A debtor’s specific request trumps everything else
  • Debtor asks that statements be sent (not exempt)
  • Debtor asks in writing that statements not be sent. (exempt)
  • Designated Address- may be established for requests to send or cease sending statements
• Exempt From Sending Periodic Statements if it would be a Stay and/or Discharge Violation
• Exemption-
  • Step 1- Must be
    • Debtor
    • Discharge of Personal Liability on the debt
      • Chapter 7- Discharge of all mortgage debt
      • Chapter 13-
        • Discharge
          • No Discharge of Long Term Mortgage Debt typical 30 year mortgage)
          • Is Discharge of Short Term Mortgage Debt (30 year amortized, all due in 5)
Exempt- You Don’t Need to Send Mortgage Statements If...

- Step 2
  - Statements Need Not Be Sent- (§ 1026.41(e)(5)(i)(B)(1) through (4))- If the Court or debtor’s actions indicate that the property or loan will not be kept,
    - Court indicia:
      - Order lifting the stay
      - Order avoiding the lien
    - Borrower indicia
      - Surrender - Chapter 7 Statement
      - Filed Plan Provides for=
        - Surrender of property
        - Voiding of lien
        - Doesn’t provide for loan
      - Chapter 7 Discharge
  - Statements Must Be Sent- If Debtor’s later actions evidence an intent to keep the property and loan
    - Examples
      - Payments being made
      - Reaffirmation of debt
What If Exemption Ends?

1. Transitioning- To, or from, a modified periodic statement
   a. If the next billing cycle due date is within 14 days of the triggering event, then the servicer is exempt from the statement requirements for one cycle
      i. Examples (assume payments due on 1st and 30 day month):
         1. Triggering event 16th-30th of month- then need not change next statement
         2. Triggering even 1st-15th of month- need to change next statement
Effective Date and Problems

Effective Date - April 19, 2018

Problems -

1. What if one borrower in Chapter 7 and the other is in Chapter 13- which statement do you send?
2. What if the debtor states in the plan that the debtor is going to avoid the lien but the court later refuses to avoid the lien (as it always should…)
3. How many of your loans are current in a chapter 7 and yet the borrower has filed an intent to surrender the property?
4. What if one borrower in bankruptcy and another is not.
5. Technology-
   a. Who is going to make the changes to the current statements
   b. How long will it take to make these changes
   c. The Proof of Claim 410-B mess
6. Conundrum- Violating the Stay and/or Discharge Injunction or violating the CFPB rules
   a. Bankruptcy Judges- About 350
   b. Bankruptcy Districts- 94
Statements and Charged Off Loans

Not required to send periodic statements on charged off loans if:

1. Servicer will not impose additional fees or interest and sends a final statement to the consumer.

2. The Servicer provides certain statement in the final periodic statement:
   a. That the loan has been charged off
   b. Servicer will not impose any new fees or interest on the loan
   c. Lien remains in place
   d. Borrower is liable for the loan and related obligations such as taxes.
Statements and Loss Mitigation

• Temporary loss mitigation programs
  
  • Periodic statement must show payments according to the loan contract without regard to the temporary loss mitigation program
  • The payments may, if appropriate, be credited as partial payments.
  • Amount due- the periodic statement may show either
    • the payment due under the temporary loss mitigation program; or
    • The amount due according to the original loan contract.

• Permanent Modifications- Statement must show amount due under the loan as modified.
Statements and Accelerated Loans

If servicer will accept a lesser amount to reinstate the loan:

1. Statement must show only the lesser amount

2. Complies with requirement to show the total amount owed under Section 1026.41(d)(1)(iii)
Early Intervention Loss Mitigation During Bankruptcy

Current Rule- No early intervention if any borrower

- Files bankruptcy
- Borrower advised Servicer to cease communication under the FDCPA

Amended Rule-

- Live Contact - A servicer is exempt from the early intervention live contact while:
  - Borrower on the mortgage loan is a debtor in bankruptcy
  - Any borrower on the mortgage loan has discharged personal liability for the mortgage loan through bankruptcy, or
  - Any borrower on the mortgage loan has invoked cease communication rights under the FDCPA.
Early Intervention Loss Mitigation During Bankruptcy

**Written Notice** – Servicers must now provide a modified single written early intervention notice to any delinquent borrower even if:

- A borrower has filed bankruptcy
- A borrower has invoked cease communication rights under the FDCPA
- Exception - Do not need written communication if there is no loss mitigation option available,

**Resuming Compliance** – Servicers must comply with both live contact and written early intervention requirements once:

- If there is no discharge of the loan - the bankruptcy case is dismissed or closed
- If there is a discharge of the loan:
  - The borrower reaffirms personal liability for the loan, or
  - The borrower continues to make mortgage payments.

**Need not resume compliance if it would violate the bankruptcy code**
Early Intervention Loss Mitigation During Bankruptcy

**CFPB Advisory Opinion** (FDCPA (15 U.S.C. §1692l(e))
- Interpretive rule/advisory opinion- provides a safe harbor for actions done or omitted in good faith reliance upon the rule.
  - No violations of Fair Debt if compliance with mortgage servicing rules where:
    - Communication with confirmed successors in
    - No violation cease communications right (FDCPA section 805(c)) where:
      - providing the written early intervention notice required by Regulation X (12 CFR §1024.39(d)(3))
      - Responding to borrower-initiated communications concerning loss mitigation

**Effective Date**- October 19, 2017 (except that the provision relating to successors in interest will take effect April 19, 2018)
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