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INTERPRETING RESPA'S REGULATION X

By Laura C. Baucus and Samantha L. Walls

The Real Estate Settlement Procedures Act (Regulation X) was enacted by the Bureau of Consumer of Financial Protection on January 10, 2014, and was designed to protect consumers when they apply for and have mortgage loans.

Its enactment set off a wave of apprehension for mortgage servicers and the attorneys who represent them. Would it open a floodgate of consumer litigation? Would its broad terms provide an unchecked avenue for borrowers to contest mortgage servicing decisions they were unhappy with? Perhaps it would stymie servicers' ability to quickly and efficiently foreclose? With almost four years of analysis and legal decisions interpreting its purpose, impact, and application, Regulation X has proven to be far less of a sea change than initially feared.

One of the foremost issues courts grappled with in the early days of Regulation X was whether it provided a private right of action for claims alleging violations of provisions other than §1024.41. Such confusion was not entirely unexpected; unlike §1024.41, which expressly provides a private right of action, the other provisions are silent on enforcement. Federal district courts interpreting Regulation X therefore reasonably held that since a private right of action was specifically articulated in §1024.41, the lack of such specific language in the remaining sections must necessarily mean that no such private right existed. Mortgage servicers and attorneys found this analysis critically important—limiting a private right of action to claims arising from §1024.41 would limit potential damage exposure significantly and provide a convenient basis to request dismissal.

However, with time comes clarity, and recent decisions in the Second, Third, Fourth, Seventh, Ninth, and 11th Circuits have evidenced a shifting trend toward applying the Real Estate Settlement Procedures Act's (RESPA's) all-encompassing private right of action to all claims brought pursuant to Regulation X—regardless of which provision plaintiffs allege has been violated. For instance, in *Lage v. Ocwen Loan Servicing LLC,* 839 F.3d 1003, 1007 (11th Cir. 2016), the 11th Circuit affirmatively applied a private right of action to bring claims under §1024.35 in, holding that "[i]f the servicer fails to respond adequately to the borrower's notice of error, then the borrower has a private right of action to sue the servicer under RESPA." Servicers should be weary of claiming a lack of private right of action as a defense. Instead, time and resources should be devoted to effectively arguing the Regulation's terms were substantively complied with in full.

Half of the federal circuits are similarly now in agreement on another issue that caused confusion in the regulation's early days: whether it could be applied retroactively, and if so, under what terms. The Sixth Circuit issued the first appellate decision interpreting §1024.41 in *Campbell v. Nationstar Mortgage,* 2015 U.S. App. LEXIS 7675 (Sixth Cir. 2015), where it held that Regulation X could not be applied retroactively if the foreclosure sale was held prior to the regulation's implementation. However, subsequent federal district court decisions in various circuits parsed the meaning of this decision, extrapolating that when the foreclosure sale was not held until after the regulation was implemented, regardless of when the loss mitigation application was initially submitted, §1024.41 loss mitigation requirements may apply.

Federal courts in the First, Third, Fifth, Ninth, 10th, and 11th Circuits have since agreed that retroactive application of Regulation X is strictly prohibited, even if the loss-mitigation application was submitted before Regulation X's effective date and the foreclosure sale occurred after such date. As succinctly put by the court in *Kawah v. PHH Mortg. Corp.,* 2016 U.S. Dist. LEXIS 178467 (E.D. Pa. Feb. 2, 2016), "Regulation X neither applies retroactively to claims initiated before RESPA's effective date nor does it impose obligations on servicers before this date." Courts have also applied the Bureau of Consumer Financial Protection's own analysis in determining that Regulation X does not have retroactive effect. As the court in *Christenson v. CitiMortgage, Inc.,* 255 F. Supp. 3d 1099 (D. Colo. June 1, 2017) stated, "numerous courts and the CFPB itself have noted [that] the CFPB's regulations do not have retroactive enforcement." Holdings such as this are particularly important in those situations when a loan modification request was submitted prior to the regulation's enactment, but the foreclosure sale was held months or even years after. Thus, the denial of retroactive applicability essentially provides a *de facto* safe harbor for servicers in regards to claims originating prior to January 10, 2014.

Federal courts have also concluded that Regulation X and RESPA do not preempt state common-law claims, except in limited circumstances. For instance, Regulation X provides a specific preemption of conflicting state laws about notices and disclosures of transfer of mortgage servicing. Under that provision, a servicer that complies with Regulation X in providing a servicing-transfer notice at the time of application or transfer of servicing of the loan need not comply with state law requiring servicing transfer notice to a borrower. Because the instances in which Regulation X would preempt state law are extremely limited, courts applying the regulation require fact and policy-specific analysis by the party asserting preemption as to why it should be applied. Indeed, in addressing a defendant's argument that a state law claim was preempted by RESPA, the court in *Hartley v. Bank of Am.,* N.A., 2017 U.S. Dist. LEXIS 10521 (W.D. Wash. Jan. 25, 2017) made clear that the "fact that state and federal statutes touch on the same topic is not enough to warrant a finding of preemption. The intent of Congress and the practical impacts of the state law on the way Congress intended the federal statute to work must be considered when determining the preemptive scope of a federal statute." Thus, mortgage servicers should be prepared to provide specific and numerous evidentiary and policy arguments to support a preemption defense.

Unfortunately, the question of what constitutes a "reasonable" response to a borrower's notice of error or request for information pursuant to §1024.35 and §1024.36 remains highly subjective. And why wouldn't it be? Reasonableness, in general, is a highly fact-specific inquiry that turns on not only the nuances of the issue, but also what is considered "normal" in the particular industry and jurisdiction. Mortgage servicers should therefore proceed with an abundance of caution when responding to requests—in this instance, from a review of the applicable case law, it appears to be far better to be over inclusive than to risk a court finding that a limited response was unreasonable. Responses to borrower inquiries should indicate what steps were taken to investigate the borrower's allegation, respond directly to the borrower's question or concern, and provide accurate and supportable information for the response. Failures to address specific borrower concerns or provide requested documentation such as a payment history have doomed mortgage servicers in courts across the country.

Finally, mortgage servicers can rest easier knowing that courts have strictly construed RESPA and Regulation X's requirement that borrower's plead actual damages. In fact, decisions in favor of mortgage servicers on this issue

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have far exceeded those in favor of borrowers.

However, courts have demonstrated a willingness to find borrowers have alleged actual damages where the conduct claimed of was demonstrably related to the claimed injury. In *Renfroe v. Nationstar Mortgage, LLC,* 822 F.3d 1241, 1244 (11th Cir. 2016), the court found a borrower had properly claimed actual damages when she alleged that despite her request for her servicer to investigate potential mortgage loan overpayments, the servicer failed to conduct a reasonable investigation, causing the borrower to lose out on a refund of those overpaid monies.

Courts across the country have generally done an admirable job interpreting and applying Regulation X, particularly in light of its many subjective points of analysis. While the number of mortgage and loss mitigation-related actions brought by consumers has waned in the years since Regulation X was enacted, there is still a significant cohort of borrowers who are waiting to take their shot at recovery via the regulation. Nevertheless, if servicers remain vigilant and continue to employ best practices in responding to borrower inquiries, they should continue to see litigation success.

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ADA IMPLICATIONS FOR SERVICER WEBSITES

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When George H.W. Bush signed into law the Americans with Disabilities Act in 1990 (ADA), it was intended to provide equal access to those with disabilities. At the time, the internet as we now know it did not exist. As a result, no one could have predicted how the ADA would interact with online services. According to a November 2018 story by the Los Angeles Times ("Lawsuits Target Access to Website"), there were nearly 5,000 ADA lawsuits filed in Federal Court for alleged website violations in the first half of 2018 alone. At this point, the number is expected to rise nearly 10,000 for the calendar year, an increase of 30 percent over the number of similar suits in 2017. As more providers tout their web access, one can expect those numbers will continue to increase in the future.

While many of the website-access ADA complaints targeted retailers, restaurants, and universities, a number of our servicer and lender clients have been recently hit with a rash of demand letters and, in some instances, lawsuits under the ADA alleging that public accommodations' websites are not accessible to blind individuals. The claimants contend that they visited our clients' website and were denied full and equal access to the client's services, as well as the ability to enjoy the services offered to the public through the website. The demand letters and lawsuits allege various violations of both Federal and State law. Generally, these demands and lawsuits seek early settlement with the proviso that the client remediates its website. A brief overview of the law in this area, as well as potential exposure for clients, is set forth below.

There is no longer any meaningful dispute that business websites are places of public accommodation under the ADA. The Department of Justice (DOJ), charged with implementing regulations for compliance with ADA mandates, has stated as much on numerous occasions and courts across the country have rejected arguments that websites do not fall under the ADA. Moreover, courts in California have held that a website's noncompliance with the ADA is, in and of itself, sufficient to trigger a violation of the ADA without requiring the claimant to first establish that he or she genuinely sought the goods or services of the business. Such a violation calls for a statutory penalty of $4,000 and, more importantly, potentially triggers the claimant's right to recover attorneys' fees under the ADA and various state law corollaries.

To further complicate matters, there are no firm guidelines on exactly how a website must be formatted or implemented to comply with current ADA mandates against nondiscrimination and communication. The DOJ has yet to issue formal guidelines for website compliance under the ADA and, based upon its most recent public statements, has no plans to do so and instead has taken the position that such guidelines are the responsibility of the legislature or the Attorney General. Courts have generally accepted that compliance with the privately developed Web Content Accessibility Guidelines (WCAG) 2.0 technical standards are sufficient to satisfy current ADA mandates, but the DOJ announced in October 2018 that "public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA," indicating, at the very least, that noncompliance with WCAG 2.0 is not in and of itself a violation of the ADA, but again refusing to establish firm guidelines for private businesses to follow.

Based on the state of the law and the right to recover attorneys' fees under the ADA and its state law corollaries, plaintiffs' attorneys are scouring websites for potential violators. Most attorneys first send demand letters, but, if their demands are not met, quickly file suit against businesses and service providers. These demands and lawsuits pose a significant risk in the terms of statutory damages, remediation costs, and potential attorneys' fees.

With the law in this area developing on a near daily basis, there are several defenses that loan originators, servicers or other providers can assert. However, the best defense is to take preventative measures now to avoid these demands and lawsuits in the future.

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