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Fifth Circuit Takes Homeowner to Task for "Abuse of the System" in Denying RESPA Claims

By Mark Tyson **May** 2019

The United States Court of Appeals for the Fifth Circuit recently rejected a consumer's claim that his mortgage servicer had improperly processed his loss mitigation applications. The homeowner obtained a residential mortgage loan in 2005 secured by a deed of trust. He began falling behind on his payments in 2009 and made his last payment in 2014. After he defaulted and foreclosure proceedings were commenced, the homeowner began submitting a series of loss mitigation applications and filed for bankruptcy. The servicer denied the homeowner's requests for a loan modification based upon investor guidelines, but advised him of other loss mitigation options. After the homeowner failed to take advantage of those options and his bankruptcy was dismissed, the loan was accelerated. The homeowner then filed suit in state court against servicer and the note-holder asserting claims under the Real Estate Settlement Procedures Act ("RESPA") and state law. While RESPA includes various servicing requirements, "A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application." *See* 12 C.F.R. § 1024.41(i)(2014). The homeowner alleged that § 1024.41(i) was an affirmative defense and that compliance before the 2014 effective date did not satisfy the servicer's obligations. Following removal, the district court entered summary judgment in favor of the defendants.

On appeal, the Fifth Circuit held that § 1024.41(i) was not an affirmative defense that was required to be pled. Rather, the court found that the defendants' denial of the homeowner's RESPA claim and affirmative assertion of compliance with RESPA were "a denial or direct contradiction of [the homeowner's] claim, not an affirmative defense." Second, although noting the recent amendment to the regulation, the Fifth Circuit held "that § 1024.41 is not retroactive." However, because the "apparent purpose of the regulation is not to make already compliant servicers repeat their compliance actions, but rather to bring noncompliant servicers into compliance. . . if the servicer complied with the requirements of the provision prior to the effective date, that compliance must be credited to the servicer because it need only comply with such a requirement once." As a result, the Fifth Circuit affirmed the dismissal of the homeowner's RESPA (and state law) claims.

Finally, the Fifth Circuit chastened the homeowner and his counsel for their delay and litigation tactics:

> The history of this case demonstrates beyond cavil that [the homeowner] has spent the last 10 years gaming the system through a series of applications for loan modification, a flawed bankruptcy filing, and the institution of this lawsuit. Doing so has enabled him to achieve his one overarching goal: The prolonged occupancy of his residence with little or no

> payment on his mortgage debt. With the help of cunning counsel, [the homeowner] used the intended *shield* of RESPA, TDCA, and various state and federal laws as a *sword* to avoid (or at least minimize) his mortgage payments while continuing the decade-long occupancy of his encumbered house. Today's termination of [the homeowner's] abuse of the system is long overdue. We caution [the homeowner], and his present and future counsel, if any, that further machinations to prolong this litigation or delay foreclosure proceedings could and likely will be met with sanctions.

Enough said. *See Germain v. U.S. Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-7*, 920 F.3d 269 (5th Cir. Apr. 3, 2019).

To discuss further, please contact:

Mark Tyson at mtyson@burr.com or (601) 709-3410 or the Burr & Forman attorney with whom you regularly work.